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85
No. 2704

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWIN R. CROOKER, LOUISE E. CROOKER, W.
P. ELLIS and F. W. STERLING,
Plaintiffs in Error,

VS.

ELIZABETH KNUDSEN,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

DEC 24 1915

F. D. Monckton,

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWIN R. CROOKER, LOUISE E. CROOKER, W.
P. ELLIS and F. W. STERLING,
Plaintiffs in Error,
vs.

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Defendant in Error.

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Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Plaintiffs in Error:

Messrs. DAVIS, KEMP & POST,
Suite 812 Marsh-Strong Bldg., Los Angeles,
California.

For Defendant in Error:

ROBERT L. HUBBARD, Esq.,
838 Van Nuys Building, Los Angeles, Cal-
ifornia [4*]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, EDWIN R.
CROOKER, HARRY L. CROOKER, LOU-
ISE E. CROOKER, W. P. ELLIS and F. W.
STERLING,

Defendants.

Writ of Error.

United States of America,—ss.

The President of the United States, to the Honor-
able BENJAMIN F. BLEDSOE, Judge of
the United States District Court, Southern Dis-
trict of California, Southern Division, Greet-
ing:

Because in the record and proceedings, as also in
the rendition of the decision and order on motion to
vacate an order of arrest, which is in the said Dis-

*Page-number appearing at foot of page of original certified Record.

trict Court, before you, between Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, plaintiffs in error, and Elizabeth Knudsen, defendant in error, a manifest error hath happened, to the damage of Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, plaintiffs in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given that under your seal you send the record and proceedings thereof, with all things concerning the [5] same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at San Francisco, in the State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 7th day of September, 1915.

[Seal] WM. M. VAN DYKE,
Clerk of the United States District Court for the
Southern District of California, Southern Division.

By Chas. N. Williams,
Deputy Clerk.

The above Writ of Error is hereby allowed this 7th day of September, 1915.

BLEDSON, J.,
Judge.

I hereby certify that a copy of the within Writ of Error was on the 7th day of September, 1915, lodged in the clerk's office of the United States District Court for the Southern District of California, Southern Division, for said defendant in error.

WM. M. VAN DYKE,
Clerk United States District Court, Southern District of California, Southern Division.

By Chas. N. Williams,
Deputy Clerk. [6]

[Endorsed]: Original. Civ. No. 363. In the United States District Court, in and for the Southern District of California, Southern Division. Elizabeth Knudsen vs. Domestic Utilities Mfg. Co., a Corp., et al. Writ of Error. Filed Sep. 7, 1915. Wm. Van Dyke, Clerk. By Chas N. Williams, Deputy Clerk. [7]

*In the District Court of the United States, Southern
District of California, Southern Division.*

Plaintiff,

ELIZABETH KNUDSEN,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, EDWIN R.
CROOKER, HARRY L. CROOKER, LOU-
ISE E. CROOKER, W. P. ELLIS and F. W.
STERLING,

Defendants.

The President of the United States of America,
to Elizabeth Knudsen, Defendant in Error, and
to Robert L. Hubbard, Her Attorney, Greeting:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Ap-
peals for the Ninth Circuit, at the City of San Fran-
cisco, State of California, on the 9th day of October,
1915, pursuant to writ of error filed in the clerk's
office of the United States District Court for the
Southern District of California, Southern Division,
sitting at Los Angeles, California, wherein Edwin
R. Crooker, Louise E. Crooker, W. P. Ellis and F.
W. Sterling are plaintiffs in error and you are de-
fendant in error, to show cause, if any there be, why
the decision and order denying the motion of said
plaintiffs in error, and each of them, to vacate an or-
der of arrest, as in said writ of error mentioned,
should not be corrected and why speedy justice
should not be done the parties in that behalf.

WITNESS the Honorable BENJAMIN F. BLEDSOE, Judge of the United States District Court, this 10th day of September, 1915.

BLEDSOE,
United States District Judge. [8]

[Endorsed]: Civ. No. 363. In the United States District Court, in and for the Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company, a Corporation, Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling. Citation in Error. Filed Sep. 11 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk.

Received copy of the within Citation this 11th day of Sept. 1915.

ROBERT L. HUBBARD.

Attorney for Pltf.

By D. E. BERGMAN. [9]

*In the United States District Court, in and for the
Southern District of California, Southern Division.*

No. 363—CIVIL.

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), EDWIN R.
CROOKER, HARRY L. CROOKER, LOU-
ISE E. CROOKER, W. P. ELLIS, and F. W.
STERLING,

Defendants, [10]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, EDWIN R.
CROOKER, HARRY L. CROOKER, LOU-
ISE E. CROOKER, W. P. ELLIS and F. W.
STERLING,

Defendants.

Engrossed Bill of Exceptions.

BE IT REMEMBERED, That in this cause now
pending in the above-entitled court, the following
proceedings were had:

That on the 26th day of January, 1915, the plaintiff filed her complaint in said cause, which said complaint is in words and figures as follows:

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), EDWIN R.
CROOKER, HARRY L. CROOKER, LOUISE E. CROOKER, W. P. ELLIS and F. W.
STERLING,

Defendants.

Complaint.

Elizabeth Knudsen complains of the defendants and for [11] cause of action alleges:

First. That she is a single woman, a resident and citizen of the City of Washington, in the District of Columbia.

Second. That Domestic Utilities Manufacturing Company is a corporation, organized and existing under and by virtue of the laws of the State of California, and at all times mentioned in this bill of complaint has had and maintained its principal place of business in the City of Los Angeles, in the County of Los Angeles, and State of California.

Third. That the defendants Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, and each of them have been, at all times mentioned in this complaint and each of

them have been, at all times mentioned in this complaint, and each of them now are, residents and citizens of the State of California.

Fourth. That on, to wit, the 7th day of July, 1911, at the City of Los Angeles, in the State of California, plaintiff entered into a contract in writing with the defendant, Domestic Utilities Manufacturing Company, a copy of which said contract is hereunto attached, marked exhibit "A" and made a part hereof.

Fifth. Plaintiff is informed and believes, and upon such information and belief alleges, that on said 7th day of July, 1911, the defendants, Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling and each of them were, and that at all times mentioned in this bill of complaint, they and each of them have continued to be and that each and all of them now are, members and stockholders in the defendant corporation, Domestic Utilities Manufacturing Company, and that at all times mentioned in this bill of complaint, all of said individual defendants have been and now are directors and officers, or directors or officers of said Domestic [12] Utilities Manufacturing Company, the defendant corporation, but that she is unable to say, for want of knowledge, during what period or periods of time any of said persons acted as directors only, or as officers only or both as directors and officers of said corporation defendant, with greater particularity or certainty, but she is informed and believes and upon such information and belief alleges, that on said 7th day of July, 1911, the defend-

ant, W. P. Ellis, was the Secretary of said corporation, and on said date was performing and did perform the duties of said office, and did, on said date, and as such officer, subscribe his name to said contract, exhibit "A," herein set forth by copy, and did on said date, and as such officer attach the name and official seal of Domestic Utilities Manufacturing Company to said written contract. She further says that at the time of the making of said contract on said date, she subscribed her name thereupon as a part thereto.

Sixth. Plaintiff further says, that before, and at the time of the signing of said contract by said corporation and this plaintiff, said corporation, by and through its officers, the individual defendants herein, had caused to be written, printed and publicly circulated divers and sundry papers, circulars, documents, booklets, prospectus and letters, wherein and whereby the defendants and particularly the defendant corporation offered for sale and offered and proposed to sell to members of the public, certain therein described clothes-washers, ovens and flues, and certain therein described patent rights and territorial rights and the right to purchase and to sell, at wholesale and retail, said washers, ovens, flues and to sell patent rights and territorial rights to others. That plaintiff received and read divers and sundry of said papers, circulars, documents, booklets, prospectus and letters and read them before entering [13] into said contract, and was, by the contents thereof induced to enter into said contract, and that she believed and relied upon each and every statement con-

tained in said papers, circulars, documents, booklets, prospectus and letters, and so believing and relying thereupon, entered into and executed said contract as aforesaid, and purchased from the defendant corporation 1667 vacuum clothes-washers, and paid defendant corporation therefor, the sum of \$5,000.00.

Seventh. That she relied upon the promises and agreements set forth in said contract and each of them, and so relying thereupon entered upon the business of selling said clothes-washers in wholesale lots and at retail, and in accordance with the terms of her said contract and at the prices and on the terms and under the conditions required by the terms of her said contract with the defendant corporation; that in entering upon and prosecuting the said business, she was put to large outlay and expense which she laid out and paid from her own private funds; that she employed other persons and paid them for their services; that she spent large sums of money in traveling from place to place in selling large numbers of said washers; that she established throughout the United States, at a number of cities, suitable and sufficient places of business wherein to conduct the business of selling said washers; that in establishing said places of business, she paid out large sums of money for rents, leases and in fitting up said places of business; that she established at various cities in the United States, factories for the manufacture of said washers and paid out and expended large sums of money in so doing; that she advanced and paid to said defendant corporation Domestic Utilities Manufacturing Com-

pany large sums of money in payment for large numbers of said clothes-washers and ordered the said Domestic Utilities Manufacturing Company to deliver to her said washers, [14] by shipment thereof to various persons and to various points throughout the United States, but which said washers were never delivered to her by said Domestic Utilities Manufacturing Company, all of which said outlays, expenditures of money and payments made to said defendant Domestic Utilities Manufacturing Company are more fully set forth, itemized, tabulated, and particularized hereinafter.

Ninth. That in all things and in each and every particular, plaintiff kept, carried out and performed the said contract so entered into on said 7th day of July, 1911, by and between plaintiff and said Domestic Utilities Manufacturing Company, the defendant corporation herein, as herein set forth by copy and designated exhibit "A," but that the defendant corporation Domestic Utilities Manufacturing Company disregarding its said agreements and said contract, utterly failed, neglected and refused to keep, carry out or perform its said contract with plaintiff, and failed and refused to deliver to plaintiff or to ship to her order the 1667 vacuum clothes-washers so bought by plaintiff from defendant corporation, or any part or portion thereof, though often demanded after the same were due, by the terms of said contract, to be delivered to plaintiff; that said defendant corporation, on divers and sundry occasions shipped and delivered to plaintiff and to customers of and purchasers from this plaintiff, de-

fective, damaged and unsalable clothes-washers, and clothes-washers that were utterly worthless and unfit for sale or for use or for any purpose whatever, and in insufficient quantities and less than were ordered and paid for by plaintiff to said defendant corporation; that the defendant, Domestic Utilities Manufacturing Company likewise failed, neglected and refused to deliver to plaintiff, and refused to [15] ship to her order, as required by the terms of said contract more than or about 30,000 of said vacuum clothes-washers which had been sold by plaintiff to members of the public, customers of plaintiff; that she sold in all, more than 36,000 of said washers; that the defendant corporation never did deliver to plaintiff more than 4,000 of said washers. Plaintiff further says that the defendant corporation during about one year from and after the said 7th day of July, 1911, continually and repeatedly failed to deliver to plaintiff or to ship to her order, clothes-washers sold by her, and until she had sold and had become obligated to deliver to her purchasers about 7,000 of said washers, and that, in order to carry out her agreements and contracts with her said customers and purchasers, to avoid failure upon her part to perform her every agreement with her said purchasers, and to act in perfect good faith with said purchasers, she was compelled to and did establish manufactories and was compelled to and did manufacture washers with which to fulfill her said agreements; that during said time of about one year, above mentioned, the defendant corporation by and through its officers and members, the individual de-

fendants herein pretended to be unable to manufacture said washers fast enough to meet the demands of the public, whereas, said corporation was not trying to manufacture said washers for said trade or to meet the demands of the public or to comply with its said contract with this plaintiff and other contract holders holding contracts with said defendant corporation of the same nature as the contract held by plaintiff, and in that regard alleges:

That the defendants Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, co-operating one with the other and confederating together, conspired to [16] deceive, to cheat and swindle this plaintiff and others by means of and through the agency of said papers, circulars, documents, booklets, prospectus and letters and their contents so written, printed and publicly circulated by the defendants as hereinabove alleged, and by means of the contents of said contract of July 7, 1911, to cheat, to defraud, and to swindle this plaintiff, and to that end represented, stated, set forth and pretended in all said documents, and by the contents thereof lead readers thereof to believe that said Domestic Utilities Manufacturing Company was actually and really engaged in the manufacture and sale, at wholesale and retail, of vacuum clothes-washers, ovens and flues, to its agents and their customers and the public; that said statements and pretenses and representations in all said documents and in said contract were false, and were a sham and deceit, and worked a fraud upon plaintiff, in this, that defendant corporation was not, nor had

it ever been actually or really manufacturing for sale or selling, either at wholesale or retail, said washers, ovens or flues, or any of said articles, except that said defendant corporation manufactured a few of said washers, ovens and flues for the mere purpose of show and not for delivery to buyers or to its agents, or their purchasers, and in that regard she alleges:

That she is informed and believes and upon such information and belief alleges, that the defendants have caused to be manufactured all told, only a few thousand of said washers, in no event exceeding 500,000 of said washers; that defendant corporation sold about 10,000,000 of said washers; that to fill the contracts actually sold by said defendant corporation and to deliver all washers which, by the terms of the contracts actually sold by said defendant corporation to its agents and their purchasers and the public, said defendant corporation [17] became obligated to deliver, and promised and agreed to deliver, as many as ten millions of said washers.

That instead of being actually and really engaged in the manufacture and sale of said washers and other articles, the said defendant corporation made a pretense so to do as a mere blind, shield or screen to its real business and objects, which were, to sell its said contracts, such as the one that is set forth in this complaint, to members of the public and inducing the original purchasers of said contracts to sell other contracts like them and subcontracts as provided for in all said contracts, and to reap a portion of the

purchase price of each of said resold contracts for the benefit, gain and enrichment of the defendant corporation, without the intention on the part of said corporation to deliver the washers or other articles ordered by the buyers of said original or resold or subcontracts.

That in furtherance of said scheme, and for the purpose of carrying out its plans and purposes of swindling the public, its agents and particularly this plaintiff, the defendants sought by every means in their power to encourage the sale of contracts like the one herein set forth, and to discourage in every way possible, the actual sale to the public, by its agents and their subagents, of said washers and other articles, and in that regard, and with reference to the contract so sold by said defendant corporation to this plaintiff and with reference to the dealings between said corporation and its officers, and the individual defendants herein, and this plaintiff, and in carrying out the scheme and plan of said defendants to cheat, to defraud, and to swindle this plaintiff, plaintiff alleges:

(a) That at all times after the purchase of said contract herein set forth from defendant corporation, the defendants and [18] each of them *hav* hindered and prevented her from doing the business therein contemplated, by refusing and failing to deliver the washers by her purchased from the defendant corporation, and she alleges said washers have never been delivered to her.

(b) Plaintiff alleges that she purchased from said defendant corporation and paid to defendant

corporation \$13,003.00, the full price of twelve thousand three hundred thirty-seven vacuum clothes-washers which she had sold and agreed to deliver to others as follows:

In Aug. 1911,	C. A. Potts,	334 washers,	\$1,000.00
In Sep. 1911,	Anna N. Kendall,	1667 "	1,667.00
In Apr. 1912,	Emma E. Follett,	1667 "	1,667.00
In Apr. 1912,	M. P. Wilson,	334 "	334.00
In Apr. 1912,	Ivy D. Edwards,	50 "	50.00
In May 1912,	Emma L. Nickerson,	167 "	167.00
In Jun. 1912,	Mary McDonnell,	50 "	50.00
In May 1912,	Herman J. Hall,	50 "	50.00
In Jun. 1912,	F. G. Hebbler,	50 "	50.00
In Jul. 1911,	G. G. Potts,	50 "	50.00
In Feb. 1911,	Wilson & Locke,		
	(for retail)	200 "	200.00
In Jan. 1912,	Bought for own use,	300 "	300.00
In Jan. 1912,	Bought for own use,	200 flues,	200.00
In Jul. 1912,	Annie Peiton,	50 washers,	50.00
In Jul. 1913,	Juliet Brayton,	1667 "	1,667.00
In Aug. 1913,	Claud Wyant,	1667 "	1,667.00
In Jul. 1913,	K. Barnes,	1667 "	1,667.00
And other sales and lots of which		500 "	500.00
plaintiff has not now the detailed	<hr/>		<hr/>
data on hand,	12,337		\$13,003.00

[19]

That the defendant corporation received said sum of money in payment for said several lots of washers; that after receiving the money purchase price thereof from plaintiff, the defendant corporation failed, neglected and refused to deliver said washers or any of said lots of washers or any part thereof, and none of said washers have ever been delivered by the defendant corporation or by anyone for it, to plaintiff or to her purchasers or to any person or persons for her or for them; that at the time of and after the purchase and payment for each of said lots

of washers and repeatedly thereafter, plaintiff demanded of the defendant corporation the delivery of all said washers; that defendant corporation failed and refused to deliver said washers or any of them and still fails to deliver the same or any part thereof; that plaintiff has repeatedly demanded the repayment of the said several sums of money so paid by the plaintiff to defendant corporation for said several lots of washers; that the defendant corporation has failed and refused and still fails and refuses to repay to plaintiff said sums of money or any of them or any part thereof, and still retains and keeps all said money.

(c) That plaintiff established factories and salesrooms in the City of Chicago, Illinois, and in the City of New York, New York, and salesrooms in the Cities of Portland, Oregon, Salt Lake City, Utah, Denver, Colorado, Toronto and Vancouver, Canada, wherein and whereby to supply said washers to persons to whom she had sold said washers; that said factories and salesrooms were established by her with the consent and authority of the defendant corporation; that after she had established said factories and salesrooms and had begun to manufacture said washers in said cities for said purpose defendants sent divers and numerous persons into said City of Chicago, and [20] into said City of New York and into each City where she established said factories and salesrooms and offered through said persons to sell to and to supply the public with said washers at and for the price of forty cents each; that said price was less by more than one-half than plaintiff was permitted, by the terms of her said contract

with said defendant corporation to buy said washers from said corporation; that by the terms of said contract, plaintiff and her subcontractors were prohibited from selling any of said washers at retail, or the family right to use the same for less than \$3.50 for each washer for the first or initial sale, and \$1.50 for each washer for subsequent sales, and the right to use washers so purchased was limited to the one family purchasing the right and such washer or washers; that the offering to sell said washers to the public by the defendants at such low price was intended to prevent, and did prevent plaintiff from finding purchasers for washers offered by her for sale at \$3.50 each of \$1.50 each as above alleged, and prevented plaintiff from carrying out the business of selling said washers as by the terms of her contract she had a right to do; that plaintiff was, by the offering by the defendants to sell said washers at such low price in said markets as aforesaid, completely driven out of business at said Cities of Chicago and New York and elsewhere in cities above-named, and was caused great damage thereby.

(d) That, after plaintiff had secured permission and authority from the defendant corporation to manufacture said washers with which to supply those who purchased the same from her, and after she had expended large sums in establishing said factories and salesrooms in said several cities, and after she had paid out and expended large sums of money to effect the sale of said washers, and at a time when plaintiff had built up a large and profitable business in the sale of said washers, [21] defendants, in furtherance of their said conspiracy and

with the design of driving plaintiff out of the business of manufacturing said washers for actual sale to the public, and with the design and purpose of crippling her financially and preventing her from getting any profit from said business and to cheat, to defraud and to swindle her out of her money plaintiff had paid for her said contract and said 1667 washers and for contracts paid for by plaintiff to the defendant corporation for the contracts and washers sold to other persons by her, wrongfully and willfully caused to be written, printed and circulated through the United States Mails, and as plaintiff is informed and believes, and upon such information and belief alleges, to the extent of many thousands of copies, a circular letter in the words and figures set forth in one of said circular letters hereto attached and made a part of this complaint and marked and designated exhibit "B." That the defendant corporation had not, previous to sending out said circular or at all, cancelled plaintiff's right to manufacture said washers, nor had it notified plaintiff of any such action on its part, but on the contrary said defendant corporation up to the time of sending out said circulars had been recognizing, and at that was recognizing, and for a long time thereafter continued to recognize plaintiff's right and authority to manufacture said washers and her right to sell the same and to deliver said washers to purchasers; that no such letter or notice as is stated or described in said circular letter, exhibit "B," to have been sent to or given to plaintiff was ever received by her, and, as plaintiff is informed and be-

lieves and upon such information and belief alleges, no such letter or notice was even sent to or prepared to be sent to plaintiff by defendants. She further [22] says that the person named and referred to in said circular as H. L. Crooker never, at any time or place called upon plaintiff for the purpose set forth in said circular or for any like purpose. That said circular was wholly false and misleading and was so wrongfully and willfully and viciously prepared and sent out by defendants to prevent plaintiff from carrying forward the business of actual manufacture and actual sale of said washers and for the further purpose of carrying out the scheme, plan and conspiracy of defendants to cheat, to defraud and to swindle this plaintiff out of the money so paid by plaintiff to the defendant corporation, and to drive her out of said business of actually manufacturing and actually selling said washers to the end that the defendants would thereby be the better enabled to cheat, to defraud and to swindle other persons; by selling to them contracts like the contract herein set forth by exhibit "A." That the sending out of said circular as aforesaid did injure plaintiff, and did destroy her said business, and deprived her of the confidence of the public and of her customers and her agents, and did cause her great loss and damage in money, as hereinafter set forth.

(e) Plaintiff further alleges, that the defendants, Edwin R. Crooker and H. L. Crooker and each of them, in furtherance of said conspiracy to cheat, to defraud and to swindle this plaintiff, openly and in a public meeting held by said Crookers in the

Marbridge Building, at 34th and Broadway in the City of New York, on or about April, 1913, and in a public meeting held by said Crookers in the Long-acre Building at 42d and Broadway in said city and at other like meetings, in the City of New York and at several places in the City of Chicago, declared that this plaintiff had never had authority from the defendant corporation to manufacture said washers at any place; that said [23] statements so made by said defendants Edwin R. Crooker and H. L. Crooker were false and were viciously made by them to injure and damage plaintiff, and to prevent her from carrying out her said contract and to ruin and drive plaintiff out of said business of actually manufacturing and actually selling said washers, as she had a right to do.

(f) That before and at the time of the purchase of the said contract and said washers by plaintiff from the defendant corporation, the defendants Harry L. Crooker, Edwin R. Crooker and W. P. Ellis represented and stated to plaintiff that the defendant Domestic Utilities Manufacturing Company had procured and was the owner of patents and patent rights in Canada, the Argentine Republic, France, Germany, Russia, Norway, Denmark, Australia, Austria, Italy, Switzerland and other foreign countries and had the right to manufacture and sell in each of said countries the said vacuum clothes-washers and ovens. Plaintiff believed said statements and relied thereupon, and bought said contract and said washers with the intention and purpose of selling said washers and ovens in some or

all of said countries and of manufacturing said washers and ovens in many of said countries; that said representations and statements were false; that said defendants knew them to be false at the time they were made by them; that said statements and representations so made by them were made to deceive this plaintiff and to induce her to pay her money to the defendant corporation; that plaintiff did not then know, nor did she learn of the falsity of said statements and representations until about March, 1912, when and after she had paid out and expended large sums of money in establishing a business in the City of Toronto, Canada, for the purpose of manufacturing and selling said washers in said place; that before she expended any money in establishing her said [24] business in said City of Toronto she applied to and received from the defendant Domestic Utilities Manufacturing Company, permission to manufacture and sell said washers in Canada; that after she had received such permission, she relied upon the representations of the defendants Harry L. Crooker, Edwin R. Crooker and W. P. Ellis, so made to her and went to Canada on or about March, 1912, and then learned that said Domestic Utilities Manufacturing Company had secured no patents or patent rights in Canada, and had not any right whatever to manufacture or to sell said washers or said ovens in Canada; that plaintiff was not permitted by the laws of Canada, in manufacturing or selling in or importing to Canada for sale any of said ovens or washers, under the terms of her said contract and was thereby greatly damaged and suf-

ferred large financial loss, as hereinafter scheduled and set forth.

Plaintiff further alleges that in about July to December, 1912, she undertook to do business in Russia, Switzerland, France, Austria, England, Germany, Norway, Denmark, Australia, and Italy, in the manufacture and sale of said washers; that she investigated and in each of said countries learned that the defendant corporation had not, at any time, either before or on or after the date, July 7, 1911, acquired, nor had it ever owned or had the right, by patent or otherwise in any of said countries, to manufacture or to sell said washers in said countries or any of them. That plaintiff in her efforts to carry on the business of selling said washers in said foreign countries expended large sums of money and all at great loss to her financially, as hereinafter scheduled and set forth.

Plaintiff further alleges, that the acts of hindrance and obstruction and the many acts of deceit and fraud above set forth are but a small part or portion of the like or similar acts committed by the defendants against this plaintiff; that [25] all said acts and things done by said defendants to and for the hurt and injury of plaintiff and her said business, were done and performed by defendants as part of a general scheme and plan of the said defendant to avoid the performance upon their part and upon the part of said defendant corporation, of the agreements and promises upon the part of said defendant corporation made in said contract of July 7, 1911, and herein sued upon, and to hinder, delay and annoy plaintiff

from performing the said contract upon her part, and to prevent the actual manufacture and actual sale of said washers, by plaintiff, or through her said sub-agents in order that defendants might the more successfully ply their business of selling and reselling said contracts on a mere pretense that the washers in each contract so sold and described would be delivered in the future, without any intention upon the part of defendants or any of them that the washers described in said contracts should ever be delivered at any time or place.

Tenth. Plaintiff alleges that from the first she believed the said business was a legitimate and profitable business and that it was a business capable of being developed and made permanent, and so believing persisted in her efforts to make the business succeed in spite of the opposition of defendants herein; that she continued in that belief until in about September, 1913, when she discovered, as she believes, that the defendants were not sincere in making said contract and were trying to avoid the consequences of their agreements and promises by them made and by the said contract required to be performed upon the part of defendants, corporation and individuals. That in September, 1913, she made complaint against Domestic Utilities Manufacturing Company and the individual [26] defendants herein, before the Postal authorities of the United States; that an investigation was ordered and was conducted before and by W. H. Lamar, Assistant Attorney General of the United States; that the defendant Domestic Utilities Manufacturing Company, and the individual de-

defendants herein were called upon by said department so show cause before said department why a fraud order should not be issued against them; that the defendant Domestic Utilities Manufacturing Company appeared before said department and before the said W. H. Lamar, Assistant Attorney General, and were given a hearing; that at the conclusion of said hearing it was determined by said department that the selling plain involved in the contract issued by defendant Domestic Utilities Manufacturing Company to the plaintiff herein, to wit, exhibit "A," hereto attached, and other like contracts issued by said defendant corporation to others was and were in conflict with the postal fraud and lottery statutes of the United States on the ground of being an endless chain scheme; that defendants were forbidden by said department to issue any more such contracts. She further alleges that the defendant corporation herein, acting by and through the individual defendants hereinabove named, has disregarded said determination and order of said department and has continued and is continuing to issue said contracts, as plaintiff is informed and believes.

Eleventh. That the defendants and each of them, although often requested by this plaintiff so to do, have failed and refused and still fail and refuse to repay to plaintiff any of the sums of money so by her paid to said Domestic Utilities Manufacturing Company, or any part thereof, and have refused and still refuse to pay to plaintiff any of the sums outlaid and expended by her or any part thereof or to reimburse her for her [27] losses by them occasioned and

caused and by the defendants inflicted upon plaintiff, or any part thereof.

Twelfth. That the sums paid by plaintiff to the defendant corporation for washers which were never delivered, and the sums paid by plaintiff to defendant corporation for washers to be delivered to others and which were never delivered but which monies have been retained by the defendant corporation, and the sums of money laid out, paid and expended by her in establishing factories and salesrooms and in wages and other outlays in connection with the manufacture and sale of said washers, and the damage done by loss of time and otherwise to plaintiff are all more particularly and in detail form set forth and enumerated as follows:

SCHEDULE.

July 7, 1911.

Paid DOMESTIC UTILITIES MANUFACTURING COMPANY, for 1667 wash-

ers.....	\$5,000.00	5,000.00
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September 1, 1911, to February 1, 1912.

PORTLAND, SEATTLE and VANCOUVER ENTERPRISE:

Paid C. A. Potts, wages, 4 months, \$200.00 per month.....	800.00
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Railroad fare.....	41.40
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Paid Mrs. S. D. Heapy,

wages, 4 months, \$150.00	
per month	600.00
Railroad fare.....	41.40
Fitting office and salesrooms in Portland	350.00
Rent office and salesrooms in Portland, 3 months, \$50.00.....	150.00
Expenses plaintiff, Potts Heapy, 1 trip from Port- land to Vancouver, B. C.	180.00
Railroad fare same.....	135.00

[28]

Plaintiff's traveling ex- penses 1 trip Portland...	250.00
Freight on washers in and out of Canada.....	19.00
Expenses of Plaintiff, Potts and Heapy return to Los Angeles.....	124.20

————— 2,691.00

October, 1911.

SALT LAKE CITY, UTAH,
ENTERPRISE:

Sent C. W. Fleming to Salt Lake City, fare.....	47.00
Paid C. W. Fleming, wages, 6 weeks, at \$200.00 per month..	300.00
Fitting up office and sales-	

room.....	100.00
Rent of office and salesroom, 1 mo.....	50.00

 497.00

November, 1911.

DENVER, COLORADO ENTERPRISE:

Sent C. W. Fleming to Denver, Salary, fare and fitting up and renting salesroom.....	350.00
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November and December, 1911

Sent Herman Schreiber to Denver, fare, round-trip.	84.00
Paid Herman Schreiber wages.....	50.00
Paid Herman Schreiber expenses.....	28.00
Plaintiff's fare and expenses trip.....	42.00
Plaintiff's expense six days.	18.00

 572.00

December, 1911.

CHICAGO, ILLINOIS ENTERPRISE:

Sent C. W. Fleming to Chicago, fare from Denver..	26.70
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[29]

Sent H. G. Riddell, demonstrator, fare and traveling expenses.....	124.00
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Paid Fleming wages, 1 month.....	200.00
Paid Riddell wages, 1 month	200.00
Fitting up salesroom 43d and Indiana, and rent...	180.00
Fitting up salesroom 4459 Evanston Avenue, and rent.....	85.00
Moving salesroom from 43d and Indiana to 4459 Evanston Avenue.....	20.00
Lease of 127 West North Avenue, rent April 1, 1912, to July 1, 1913, 15 mos...	1,275.00
Fitting up salesroom and furniture-....	300.00
Paid stenographer wages, 1 year.....	780.00
Establishing factory, Wells St....	
Fitting up factory and one set dies.....	1,650.00
One set dies.....	474.00
Wages men, 15 months at \$75.00 per mo.....	1,125.00
Fitting up salesroom, Joliett, wages and rent.....	350.00
Paid wages of Strubhar, 4 months, \$85.00.....	340.00
Paid wages of Stringer and rent of window 2 months..	186.00
Sent Norton to Champaign, Ill., wages and expenses..	225.00

Sent Omelvina to Indianapolis, wages and expenses.....	125.00
Sent Mr. & Mrs. Bara to Milwaukee, expenses.....	74.00
Rent booth Springfield and expenses.....	275.00
Paid fare and expenses, Mrs. Heapy, to Chicago.....	333.00
	<hr/>
	8,347.70

[30]

March, 1912.

TORONTO, CANADA ENTERPRISE:

Plaintiff's fare and expenses....	197.00
Making dies not allowed to use.....	500.00
Office rent, 2 months, \$85.00 per mo.....	170.00
Wages, 2 months, \$150.00 per month.....	300.00
Fitting up salesroom.....	170.00
Freight on washers into and out of Canada.....	64.00
	<hr/>
	1,401.00

February, 1912.

NEW YORK ENTERPRISE:

Plaintiff's fare and expense round-trip.....	74.00
Hotel and expense six days.	18.00

March, 1912.

Plaintiff's fare one way....	37.00
Rent office and salesroom, 1 year.....	2,000.00
Fitting up salesrooms.....	1,274.00
Office help 10 months, 2 persons.....	650.00
Expense moving factory from Chicago.....	748.00
Factory foreman, Dutcher, wages, 4 months.....	400.00
Salesmen, wages.....	297.00
Fireman's exhibit	135.00
Demonstration and store- rooms rent.....	369.32

5,002.32

PLAINTIFF'S LOSS OF
TIME, 2 years, at \$3,000.-

00 per year..... 6,000.00

[31]

6,000.00

REIMBURSEMENTS:

J. C. Culter.....	5,498.50
Mrs. Werstedt.. ..	150.00
Mrs. M. P. Wilson.....	1,000.00
Marie Leshbor....	75.00
Geo. Potts.....	150.00
Chas. Potts....	5,000.00
E. G. Waldron....	5,000.00

16,873.50

Paid for stationery to Domestic Utilities Man- ufacturing Company.....	500.00	
Paid for telephones, light, gas, stationery and office expenses.....	600.00	
		<hr/>
		1,100.00
Twelve thousand three hun- dred thirty-seven washers paid for and not deliv- ered....	13,003.00	
		<hr/>
		13,003.00
Cost of manufacturing Thirty-one thousand eight hundred washers to fill her orders at fifty cents each.....	15,900.00	
		<hr/>
		15,900.00
		<hr/>
Total....		\$75,407.52

Thirteenth. That it has been the universal and continuous practice of the defendants to cause to be issued to each purchaser of washers, ovens or flues from defendant corporation, pretended and so-called warehouse receipts wherein it was recited and set forth that said purchasers were the owners and entitled to receive upon demand, the number of washers, ovens or flues stated in said so-called and pretended warehouse [32] receipt, whereas in truth and in fact, no such washers, ovens or flues

or any of them were ever on hand or in storage or in any warehouse, or even at any time existed; that such warehouse receipts, so-called, were delivered to plaintiff at the time of such purchase of washers made by her as aforesaid; that she often demanded of defendants the delivery of the washers in said receipts described; that in each and every instance, defendants failed and refused to deliver said washers or any of them to plaintiff and that she never did receive any of said washers.

Fourteenth. Plaintiff further alleges, that the defendants have secured, by means of executing contracts of the same character of the contract herein set forth and sued upon and marked exhibit "A," in great numbers, and as plaintiff is informed and believes and upon such information and belief alleges, defendants issued and caused to be issued many thousands of such contract, and that it has been the policy and plan of the defendants in each and every case to secure payment for said contract and the washers, ovens or flues therein described and then to refuse to deliver said articles or any of them, or to deliver to the purchaser anything whatever; that many thousands of persons have, by the said plan and scheme been swindled by defendants out of their property and money and have been reduced to penury and want; that the defendant corporation and the individual defendants herein have practically at all times since the commencement of business, and particularly during the past year, kept its and their money, property, both real and personal, and other effects hidden and covered up and out of the reach

of legal process and secure in secret vaults and place of safety and seclusion known only to the defendants; that as plaintiff is informed and believes and upon such information and belief alleges, the said defendant Domestic [33] Utilities Manufacturing Company has property upon which seizures under the process of this court could be made, if the same can be found, and that the individual defendants herein have, as plaintiff is informed and believes, much property within the reach of the process of this court, but that all said property is hidden and secreted, so far as plaintiff has been able to ascertain. That all property owned by the individual defendants was acquired through the methods herein described. Plaintiff further alleges, that it is her belief that the defendants and each of them will, immediately upon learning of the filing of this action, absent themselves from the jurisdiction of this court and will leave the State of California and the United States, and avoid the service of writs and processes issued out of this court, upon them, and that they and each of the defendants will dispose of, hide, secrete and remove any and all kinds of personal property by them or by any of them owned, and will, so far as in their power, hide and obliterate all evidence by means of which the monies and properties of the defendants and each of them could be located and reached. And will, if within their power, put all their property of every kind and nature beyond the reach of the process of this court. Plaintiff further says that she has no adequate remedy for enforcement of any judgment she may secure in this

action or for the protection of her rights in the premises other than the remedies hereinafter prayed for; that the amount herein sued for is justly due from the defendant Domestic Utilities Manufacturing Company, and that the indebtedness became due through the fraud, deception and conspiracy of the said several individual defendants, and that she is in equity and good conscience entitled to recover the same from defendants. Plaintiff further alleges, that the said several defendants have repeatedly declared that no court could reach them or compel them to make restitution or to redress the wrongs by them committed; [34] that the debt due from the defendants to plaintiff will be greatly endangered by the defendants departing from the jurisdiction of this court, and that the concealment of the property of the defendant corporation by the said several individual defendants is done, and has been done, and will continue to be done in the future, for the sole purpose of defrauding this plaintiff and others of sums of money justly due from the defendant corporation, and in furtherance of the plan, scheme and conspiracy of the several defendants to cheat, to defraud and to swindle this plaintiff and all other persons standing in a similar relation to the defendants herein by reason of having entered into similar contracts with defendant corporation through and by and under the management, control, direction, persuasion and inducement of the said individual defendants herein, in manner hereinabove set forth and alleged.

WHEREFORE, plaintiff prays that the writ of subpoena may issue in this cause directing and re-

quiring the said several defendants to appear in this court and answer the plaintiff's complaint according to the forms and under the provisions and penalties of the law.

2. She further prays the Court that an order of arrest, or other proper order or process of this court issue, directed to the defendants and each of them, and that each of them, the said defendants, be arrested and detained until they and each of them, the said defendants, give security for their presence before the Court and against the removal or disposition of their or any of their property, and for the payment of any judgment that may be rendered herein against them or any of them, the said defendants.

3. She further prays that said writs and processes may be issued herein, and directed to the Domestic Utilities Manufacturing Company, a corporation, and to the defendants, Edwin [35] R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis, and F. W. Sterling.

4. Plaintiff further prays that she have and recover of and from the defendants and each of them the sum of \$75,407.52.

5. That she have and recover of and from the defendants and each of them her costs herein.

6. That she have any and all relief to which she may appear, in equity and good conscience, to be entitled.

ROBERT L. HUBBARD,
Attorney for Plaintiff.

ELIZABETH KNUDSEN,
Plaintiff.

State of California,
County of Los Angeles,—ss.

Elizabeth Knudsen, being first duly sworn according to law, deposes and says:

I am the plaintiff in the above-entitled action and the person named in the foregoing bill of complaint; I have read the foregoing bill of complaint, and know the contents thereof, and the same is true of my own knowledge, except as to the matters which are therein stated on my information or belief, and as to those matters I believe it to be true.

ELIZABETH KNUDSEN.

Subscribed in my presence and sworn to before me this 16 day of January, 1915.

[Seal] ANDREW M. STRONG,
Notary Public in and for the County of Los Angeles,
State of California. [36]

I, Robert L. Hubbard, attorney for the plaintiff herein, do hereby certify that the foregoing is a true and perfect copy of the complaint filed in the above-entitled cause, and that the exhibits hereto attached are true and correct copies of the exhibits attached to said complaint as filed.

ROBERT L. HUBBARD,
Attorney for Plaintiff. [37]

Exhibit "A" [to Complaint]—Agent's Contract.

This indenture, made and entered into by and between the DOMESTIC UTILITIES MANUFACTURING COMPANY, a corporation organized under the laws of the State of California, party of

the first part, hereinafter called "Company," and E. Knudsen, residing at Los Angeles, County of Los Angeles, State of California, party of the second part, hereinafter called "Agent."

1. WITNESSETH: That whereas, the aforesaid "Company" is now the owner of all the right, title and interest in Letters Patent of the United States bearing number 930,733, granted August 10, 1909, for improvements in clothes pounders, and known on the market as the Vacuum Clothes Washer and Letters Patent Number 907,102, granted December the 15th, 1908, for improvements in Ovens, and known on the market as the Four B Oven.

2. And, whereas, the said "Agent," hereinafter named, is desirous of obtaining the right to sell said Washers and Ovens and Flues for said Ovens.

3. NOW, THEREFORE, to whom it may concern, be it known that for and in consideration of Five Thousand Dollars (\$5,000) this day paid to the "Company," the receipt of which is hereby acknowledged, the said "Company" has sold unto the said "Agent" 1667 Vacuum Clothes Washers, Four B Oven Flues.

4. The said "Agent" may, if he so desires reserve and work ONE AT A TIME, any number of towns, townships, or counties in which to retail Family Rights for said Washers, Ovens and Flues to others for use, WITH THE PROVISIO that the said "Agent" shall comply with the agreements herein mentioned, and shall, on the day that he or his subagents ENTER same, send WRITTEN NOTICE to the said "Company" by SPECIAL DE-

LIVERY or TELEGRAM, of his desire and intention to reserve said town, township, or county, he may reserve the same to the exclusion of any other subsequent [38] owner of an Agent's Contract, not then retailing said Family Rights therein. Said "Agent" shall also have the right to sell said Family Rights in any unreserved town, township, or county in the United States and Territories thereof.

5. If two or more Agents enter a town, township or county on the same day, then, in that event, the notice of reservation FIRST RECEIVED by the said "Company" shall constitute PRIOR claim to said territory.

6. The said "Agent" further agrees not to enter into any territory reserved by another Agent TO RETAIL SAID FAMILY RIGHTS for use therein, without the full sanction and co-operation of the Agent then working in such territory, and said CONSENT MUST BE IN WRITING.

7. It is expressly understood that in order to hold the reservation to any territory, the said "Agent" must sell in said reserved territory under this Contract at retail, not less than fifty (50) of said Family Rights in the aggregate of said Washers, Ovens or Flues, each and every thirty (30) days after entering said territory.

8. If for any reason the right to any town or county reserved by the said "Agent" is FORFEITED, the same shall revert to the said "Company" and may in like manner be retained by another agent upon consent of the said "Company."

9. It is expressly understood that the said

“Agent” shall not have the right to retain a town, township or county of over one hundred thousand (100,000) population.

10. The said “Agent” shall have the right to appoint FIFTY (50) SUB-AGENTS to retail the said Family Rights for said Washer, Oven and Flue (said sub-agents’ duties are fully outlined in blanks furnished for that purpose by the said “Company” [39] and are to be filled out by said sub-agents and said employer); and said “Agent” SHALL NOT SELL NOR PERMIT HIS SUB-AGENTS TO SELL any Family Right for less than Three Dollars and Fifty Cents (\$3.50) for each Washer; Four Dollars (\$4.00) for each No. 1 Oven; Five Dollars (\$5.00) for each No. 2 Oven; and Two Dollars (\$2.00) for each Flue.

11. Each purchaser of a Family Right is entitled to have other Ovens, Washers and Flues from the “Company” or the said “Agent” for his or her own family use at Three Dollars (\$3.00) for No. 1 Oven; Three Dollars and Fifty Cents (\$3.50) for No. 2 Oven; One Dollar and Fifty Cents (\$1.50) per Washer (without handle), and One Dollar and Twenty-five Cents (\$1.25) per Flue, cash with order, and to each purchaser of a Family Right shall be given one Oven or Washer or Flue by the said “Agent” but to no other person or persons. The said “Agent” shall report to the “Company,” in writing, once every thirty (30) days from the date of this instrument, the name and address of each purchaser of a Family Right sold to himself or by his sub-agents.

12. Neither shall the said "Agent" nor any one under him manufacture the said Washer or Flue, nor cause the same to be done, and the "Company" hereby agrees to hereafter furnish the said "Agent" with said Washers, Ovens and Flues at One Dollar (\$1.00) per Washer (without handle); One Dollar (\$1.00) per Flue; Two Dollars and Twenty-five Cents (\$2.25) for each No. 1 Oven; Three Dollars (\$3.00) for each No. 2 Oven, F. O. B. cars Los Angeles, Cal., Lauderdale, Miss., or the "Company's" nearest shipping point; the same to be determined by the "Company," to be paid for when ordered.

13. The said "Agent" shall have the right to sell unto others wholesale lots of said Washers and Flues at the prices hereinafter named, and upon the FOLLOWING CONDITIONS: [40]

14. Upon the first sale made by the said "Agent" of a wholesale lot of Washers or Flues of the same size as the one purchased herewith, he may deliver unto the purchaser the Washers or Flues received herewith, and shall issue to the said purchaser a contract identically the same as this one, and he shall be entitled to retain the entire amount received from such sale.

15. The said "Agent" may make as many sales at wholesale as he may successfully solicit, upon such parties signing a contract in every way IDENTICAL WITH THIS CONTRACT, which has been printed upon forms for and by the said "Company," and duly approved by its officers at the following prices:

Fifty (50) Vacuum Clothes Washers or seventy-five (75) Four B Oven Flues for.....	\$150.00
One hundred and sixty-seven (167) Vacu- um Clothes-washers or two hundred fifty (250) Four B Oven Flues for....	500.00
Three hundred thirty-four (334) Vacuum Clothes-washers or five hundred (500) Four B Oven Flues for.....	1,000.00
Eight hundred thirty-four (834) Vacuum Clothes-washers or twelve hundred fifty (1250) Four B Oven Flues for....	2,500.00
Sixteen hundred sixty-seven (1667) Vacu- um Clothes-washers or two thousand five hundred (2,500) Four B Oven Flues for.....	5,000.00

16. The said "Company" hereby agreed with the said "Agent" that for each sale of Washers and Flues made by the said "Agent" of any of the lots of Washers and Flues above specified and at the prices stated; it will allow him a commission [41] upon such sales as shown in tables following:

Size of different sales of Washers

made by the said "Agent".....	\$150	\$500	\$1,000	\$2,500	\$5,000
Commission due the said "Agent"....	\$100	\$333	\$666	\$1,666	\$3,333

Size of different sales of Flues made

by the said "Agent".....	\$150	\$500	\$1,000	\$2,500	\$5,000
Commission due the said "Agent"....	\$75	\$250	\$500	\$1,250	\$2,500

16A. Besides the commission indicated in above table the said "Agent" shall receive the said "Company's" part on all sales at wholesale and increase

of said sales resulting from the sales of the aforesaid \$150.00, \$500.00, \$1,000.00 and \$2,500.00 sales at wholesale (LESS THE MONEY DUE THE "COMPANY" FOR WASHERS AND FLUES); that is to say, IN THE LINE OF SUCCESSION TO SUCH SALES and in consideration of his having purchased a \$5,000.00 wholesale lot of the aforesaid articles, provided, however, that no line of succession shall accrue to the holder of this contract unless the initial or first sale is made to the purchaser by him, the said "Agent," through his own or the solicitation of his sub-agent or agents in his line of succession; such solicitation of the purchaser to have originated through the said "Agent," his sub-agents or agents of his line of succession, and no agent shall, through any act or sale, divert any agent in the line of succession of another agent to his own line of succession, through the sale of any larger wholesale lots of said articles.

17. The "Agent" shall also have the right to sell for the "Company," said Washers, Ovens and Flues at wholesale anywhere in the United States and territories thereof (except in territory reserved by another agent). Prices and commissions on same are shown in the following tables: [42]

WASHERS.			FLUES.		
Quantity.	Prices.	Agent's Com- mission.	Quantity.	Prices.	Agent's Com- mission.
1	\$3.00	\$2.00	1	\$1.75 each	0.75 each
6	2.50 each	1.50 each	6	1.50 each	.50 each
12	2.00 each	1.00 each	12	1.35 each	.35 each
24	1.75 each	.75 each	24	1.25 each	.35 each
48	1.50 each	.50 each	48	1.15 each	.25 each
No. 1 OVENS.			No. 2 OVENS.		
Quantity.	Prices.	Agent's Com- mission.	Quantity.	Prices.	Agent's Com- mission.
1	\$3.75	\$1.50	1	\$4.50	1.50
6	3.25 each	1.00 each	6	4.00 each	1.00 each
12	3.00 each	.75 each	12	3.75 each	.75 each
24	2.75 each	.50 each	24	3.50 each	.50 each
48	2.50 each	.35 each	48	3.25 each	.35 each

18. In making sales shown in the above table, the "Agent" shall use printed form called "Retail Contract," a copy of which is shown on back of this "Agent's Contract."

19. The "Agent" may also sell (in unreserved territory) any number of said Washers, Ovens and Flues above 48 for retail purposes, the prices and commissions to be determined by the "Company."

20. The said "Agent" shall make a FULL AND COMPLETE REPORT TO THE "COMPANY" by registered letter, of each and every sale of said articles made under any Wholesale or Retail Contract, at once after completion of same, giving name of purchaser, his address and occupation, and said report shall state in full what was taken in payment for same, and the portion due, the "Company" (which is the full amount thereof less the "Agent's" commission as above stated), shall accompany said report and [43] must be paid in cash. A failure on the part of the "Agent" to send to the "Company" the amount due the "Company" for each sale so made by him will be held by the "Company" to be breach of trust.

21. The "Agent" shall sell no wholesale lots of said articles without the full price therefor being paid, nor shall the said "Agent" sell the same in his own name unto any person or persons previously solicited by any other agent or his sub-agent or his sub-agents unless he shall compensate such agent (the term "Such Agent" refers to the agent who first solicited the purchaser) with a portion of the commission that would have been due "such agent" had "such agent" closed such sale, which shall, in the absence of an agreement, be fifty per cent (50%) PROVIDED "Such Agent" be a \$5,000.00 or \$2,500.00 contract owner, otherwise the Agent who closes said sale and the Agent who first solicited the purchaser, shall divide equally between them the profit that would have accrued to the owner of the smaller contract of the two, had he closed said sale under his contract, the "COMPANY" to receive the remainder.

22. If any other arrangement be entered into between the owner of this contract and Such Agent (the term "Such Agent" refers to the agent who first solicited the purchaser) it shall provide for the payment to the "Company" of the amount due the "Company" as above stated.

23. All monies due the "Company" must be sent by draft, postoffice or express money order, and will positively not be accepted if sent otherwise.

24. Showing one or all of the above-named articles in operation and making an appointment to explain the business shall constitute a solicitation. It is clearly understood that a solicitation shall be

operative until one sale is closed, but no longer. [44]

25. The said "Agent" shall not directly or indirectly accept any other agent's or sub-agent's Wholesale Prospects or transfer his, or his sub-agent's Wholesale Prospects, nor conspire against the "Company" in any manner whatever, and shall not employ as a sub-agent, *directly or indirectly*, any owner of an agency, thus depriving the "Company" of what it would have received had the sale been closed by the agent soliciting the said prospect, and had said conspiracy not been entered into.

26. The "Agent" agrees to submit on demand of the Company, on suitable blanks furnished by the Company, a full and complete statement sworn to by him and by the purchaser of any wholesale lot of washers or flues, of the true amount of money paid and received and all transfers or representatives of value delivered or received from such sales of such articles and rights granted under any contract purchased by him, or transferred or sold by him.

27. The "Agent" further agrees that at all times he will conduct the business of selling the said Washers, Ovens and Flues, and Family Rights for same, in a business-like manner and use his utmost endeavor to introduce and sell the same to actual users thereof, and he hereby agrees that he will relinquish the right granted him to any territory he may at that time be in possession of (upon demand made upon him by the "Company") if he fails to sell less than fifty (50) Family Rights in the aggregate for said Washers, Ovens and Flues, each and every thirty (30) days as above mentioned.

28. It is *cearly* understood that the "Company" SHALL NOT BE RESPONSIBLE IN ANY MANNER WHATEVER FOR COLLECTION OF ANY OF THE AFORESAID COMMISSIONS DUE SAID "AGENT." [45]

29. In making sale of this or any of the within named Wholesale lots of Washers, Ovens and Flues, four contract forms must be filled out, one (1) to be retained by the purchaser, three (3) to be sent to the "Company," and on approval by the "Company" its seal will be placed on the same, one of which will be sent to the purchaser (in exchange for the one held by him), one to the salesman, and one to be placed on file in the offices of the "Company."

30. The said "Agent" shall have the right (if he so desires) to have said Ovens made for Retail and Wholesale purposes with the proviso: that the Flues used in said Ovens shall be purchased from the "Company" at One Dollars (\$1.00) each, F. O. B. Cars Los Angeles, Cal., Lauderdale, Miss., or the "Company's" nearest shipping point; the same to be determined by the "Company," cash with order. Said Ovens must be of the same construction and material as those furnished now and hereafter by the "Company," and the Agent agrees to report to the "Company" all of such ovens made by or for him.

31. The said "Agent" agrees to POST, INFORM AND EDUCATE ALL PERSONS TO WHOM HE MAY SELL FAMILY RIGHTS AND ALL PERSONS HE MAY APPOINT AS SUB-AGENTS OR PERSONS TO WHOM HE MAY SELL SAID AR-

TICLES AT WHOLESALE, so that they may fully understand and know how to operate the said Washer, Oven and Flue to the best possible advantage that their labors may be profitable.

32. Neither the "Company" nor any member of it shall be responsible for said instructions, and the said "Agent" hereby agrees to remain under his instructor or educator until he is posted, informed and educated as above stated.

33. The "Company" shall not be responsible in any manner for any agreements that said "Agent" or his sub-agents may make which do not exist in this document; and the said "Agent" shall have all the profits derived from the sales of said Family [46] Rights sold by him or his sub-agents.

34. The said "Agent" shall not give his sub-agents more than Twenty-five (\$25) Dollars on the sale of each one hundred and fifty dollars (\$150) wholesale lot, seventy-five dollars (\$75) on each five hundred dollars (\$500) wholesale lot, one hundred dollars (\$100) on each one thousand dollars (\$1,000) wholesale lot, two hundred dollars (\$200) on each twenty-five hundred dollar (\$2,500) wholesale lot and three hundred and seventy-five dollars (\$375) on each five thousand dollar (\$5,000) wholesale lot of the goods, hereinbefore mentioned made by said sub-agent.

35. This Contract is not transferable, except in case of death of said "Agent" (unless by the consent of the "Company") and said transfer must bear the seal of the "Company."

36. The "Company" agrees to furnish the said

“Agent” with blank formes at his expense in “Agent’s Outfit” of printed matter (said outfit containing other printed matter and certified copy of each of the above mentioned Letters Patent; furnished by the “Company” at Five Dollars (\$5.00) per outfit, cash with order) for use by him in entering into contracts and sales to others in accordance with these forms; and said “Agent” is hereby authorized and empowered to execute such contracts provided they are in accordance with this and other contract forms printed by the “Company” and the said “Agent” has not forfeited the right herein conveyed; the said “Agent” is not to use any form of contract not printed and furnished by the “Company.”

37. It is agreed by and between the parties hereto that all agreements or contracts of sales made or entered into by the said “Agent” shall be sent to the “Company” immediately upon being entered into, for the ratification and approval of the said “Company” and the “Company” agrees to act upon all sales made by the “Agent” upon presentation of the same at its offices [47] at Los Angeles, California, within sixty (60) days after execution, and it will record and register such agreements in proper books kept for that purpose. Any contract or agreement made by the “Agent” and not sent to the “Company” for approval and ratification shall become null and void after the expiration of five (5) days from the date thereof.

38. It is understood and agreed, and the “Agent” hereby specifically consents and agrees, that in the

event of said "Agent" violating any of the terms of this agreement that he shall forfeit all right to transact business under and by virtue of the rights hereunder conveyed and the "Company" may refuse to recognize said "Agent" as a lawful representative without notice.

Witness our hand and seal this 7th day of July, 1911.

DOMESTIC UTILITIES MANUFACTURING COMPANY.

By W. P. ELLIS,
Secty.

WITNESSES.

COUNTERSIGNED BY

Sales Agent sign here.

ELIZABETH BERGLUM (Seal)

Purchaser Sign Here _____(Seal)

E. KUNDSSEN (Seal)
(Seal)

(of)

(Com-)

(pany.)

(Party of the Second Part)

Signed, sealed and delivered for the purpose herein mentioned.

I have read the above instrument and understand its contents perfectly. It embraces the entire con-

tract and there are no verbal agreements not contained therein.

PURCHASER SIGN HERE—————(Seal)

Witnesses: _____

Address all Communications Unless Otherwise Notified to DOMESTIC UTILITIES MANUFACTURING COMPANY, LOS ANGELES, CALIFORNIA. [48]

(COPY)

RETAIL CONTRACT.

This indenture, made and entered into by and between the DOMESTIC UTILITIES MANUFACTURING COMPANY, a corporation, organized under the laws of the State of California, party of the first part, hereinafter called "Company" and _____ residing at _____ County of _____ State of _____ party of the second part, hereinafter called "Agent."

WITNESSETH: That, whereas, the "Company" is now the owner of all the right, title and interest in Letters Patent of the United States bearing number 930,733, granted August 10, 1909, for improvements in clothes pounders, and known on the market as the

VACUUM CLOTHES-WASHER

and Letters Patent Number 907,102, granted December 15th, 1908, for improvements in Ovens, and known on the market as the

FOUR B OVEN

And, whereas, the "Agent," hereinafter named, is desirous of obtaining the right to sell said Washers

and Ovens and Oven Flues for said Ovens.

NOW, THEREFORE, to whom it may concern, be it known that for and in consideration of ——— Dollars (\$——) this day paid to the “Company,” the receipt of which is hereby acknowledged, the “Company” has sold unto the said “Agent” ——— VACUUM CLOTHERS-WASHERS ——— No. 1 Four B Ovens, ——— No. 2, Four B Ovens, ——— Four B Ovens Flues, and does hereby grant unto the said “Agent” the right and privilege to sell Family Rights for the said Washers, Ovens and Flues to others for use.

The said “Agent” shall not sell the said Family Rights for the No. 1 and No. 2 Ovens for less than \$4.00 and \$5.00 [49] each, respectively; and the said Family rights for the Washers and the Oven Flues at \$3.50 and \$2.00 respectively; and to each purchaser of a Family Right shall be given one Oven or Washer or Flue by said “Agent.”

The “Company” agrees to furnish the said “Agent” all the No. 1 and No. 2 Ovens, Washers and Flues he may hereafter desire, to be paid for when ordered, at the prices stated in the following table, F. O. B. cars Los Angeles, Cal., Lauderdale, Miss., or the “Company’s” nearest shipping point; the same to be determined by the “Company.”

No. 1 OVENS, RETAILING

AT \$4.00 EACH.		WASHERS
1 at	\$3.75	1 at \$3.00
6 at	3.25 each	6 at 2.50 each
12 at	3.00 each	12 at 2.00 each
24 at	2.75 each	24 at 1.75 each
48 at	2.50 each	48 at 1.50 each

No. 2 OVENS, RETAILING

AT \$5.00 EACH.	FLUES.
1 at \$4.50	1 at \$1.75
6 at 4.00 each	6 at 1.50 each
12 at 3.75 each	12 at 1.35 each
24 at 3.50 each	24 at 1.25 each
48 at 3.25 each	24 at 1.15 each

It is agreed by and between the parties hereto that this agreement or Contract of sale shall be made in triplicate; two of the same shall be sent to the "Company" at Los Angeles, California, immediately upon being entered into for the ratification and approval of the said "Company," one to be placed on file in the offices of the "Company," the other to be returned to the purchaser, the third to be retained by the salesman. [50]

This Contract or agreement shall become null and void if not sent to the "Company" for their approval and ratification within five (5) days from date hereof.

Witness our hands and seals this — day of —, 1910.

DOMESTIC UTILITIES MANUFACTURING COMPANY.

By _____,
(Seal of Company.)

WITNESSES:

Endorsed:

2

\$5000 AGENTS CONTRACT
DOMESTIC UTILITIES MANUFACTURING
COMPANY

With

E. KNUDSEN

Los Angeles

(Postoffice Address Here)

California

(County and State Here)

Real Estate

(Occupation)

E. Borglum.

(Name of Salesman Here)

Sierra Madre

(Postoffice Address Here)

Los Angeles, Cal.

(County and State Here)

Date — July 7, 1911.

Copyright. Domestic Utilities Manufacturing Co.
1910. [51]

[**Exhibit "B" to Complaint—Circular Letter.**]

Los Angeles, Cal., July 9, 1913.

AGENTS' NOTIFICATION.

Cancellation of Miss KNUDSEN'S MANUFACTURING RIGHT.

Dear Sir:

This letter is to notify you that Miss Elizabeth Knudsen's right to manufacture washers for the Domestic Utilities Manufacturing Company has

been formally cancelled. Copy of our letter to Miss Knudsen is as follows:

“Miss Elizabeth Knudsen,
39 West 34th Street,
New York.

Dear Madam:

On February 15th we notified you that your right to manufacture Vacuum Clothes Washers and sell same to the agents of this company on a royalty basis was cancelled. Since the above date you have continued to manufacture, sell and deliver these washers.

We are writing now only to say that we wish this arrangement discontinued at once and desire that you regard this letter as a formal notice to this effect, and also to say that we have instructed our Mr. H. L. Crooker in New York, to call upon you and arrange to pay you the cost of manufacture for all washers which you now have on hand. We desire to make a fair and equitable settlement with you in this matter, not in a spirit of appearing to be dissatisfied with the work which you have done, but merely because the exigencies of the business require it.

Kindly send us on receipt of this letter, a full and complete statement of all of the washers that you have sold and manufactured to date and accompany same with remittance for the royalty due us, in accordance with the letter which you sent us in which you stated that a statement of this kind would be forthcoming from you on the first of May.” [52]

This manufacturing right was given to Miss Knudsen in the early stages of the business in the

East, before we began to manufacture machines in the East.

We want you to thoroughly understand that this cancellation of Miss Knudsen's manufacturing right is not for the purpose of throwing any discredit on Miss Knudsen, but is made necessary in order to expedite the filling of orders and the ratification of contracts.

On and after the receipt of this letter all orders for washers, together with the company part of the money, must be sent direct to the company, according to contract, unless otherwise notified.

Yours truly,

DOMESTIC UTILITIES MFG. CO.

EXHIBIT "B."

[Endorsed]: Civ. No. 363. In the District Court of the United States, Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company (a Corporation), Edwin R. Crooker, Harry L. Crooker, Louis E. Crooker, W. P. Ellis and F. W. Sterling, Defendants. Complaint. Filed Jan. 26, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deyupt. Robert L. Hubbard, 838 Van Nuys Bldg., Attorney for Plaintiff. [53]

That on said 26th day of January, and concurrently with the filing of the complaint in said action, said plaintiff filed in the office of the clerk of this court the following affidavits:

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, EDWIN R. CROOKER,
HARRY L. CROOKER, LOUISE E.
CROOKER, W. P. ELLIS and F. W.
STERLING,

Defendants.

**Affidavit of Mrs. M. E. Marsh in Support of
Application for Order of Arrest of Defendants.**

State of California,
County of Los Angeles,—ss.

Mrs. M. E. Marsh, being first duly sworn, according to law, deposes and says: I am over the age of twenty-one years and a resident of Los Angeles, California.

On the 24th day of January, 1915, I called up telephone number 74342 of the Home Telephone exchange in the City of Los Angeles, California; that a very coarse man or male voice answered the telephone; I asked if I might speak to Mrs. Crooker; the person at the other end of the telephone said "Yes, certainly"; after a little time, a lady's voice answered the telephone and I asked: "Is this Mrs. Crooker?"; the person at the other [54] end of the telephone answered: "Yes." I then said: "I want to ask you about and how I can find Mrs. Cayce.

I want to see her about her land." I then said, "I met your husband, Mr. E. R. Crooker, and Mrs Cayce a few months ago, and would like to talk to them again before I return to my home." The lady's voice at the other end of the phone then asked who I was, and I gave my name as Mrs. Reed, and asked where I could see Mrs. Cayce. The lady's voice at the other end of the telephone said "I cannot tell you. I have not seen her in three months, but I think she is in the city somewhere. Her attorneys are Davis, Kemp and Post, Marsh-Strong Building." I then said, "Where can I see Mr. Crooker?" The voice at the other end of the telephone replied: "He is in Brawley." I then asked how long he would be there, and the voice at the other end of the telephone said, "Only two or three days." I thanked the person and hung up the telephone receiver.

Affiant further says, that when she called the number 74342 first she received no reply; that she called several times and getting no answer, she called up F93 on said telephone system which is known as "Information" and asked for the telephone number of Mr. Edwin R. Crooker; that the operator at "Information" told affiant to call the "Chief Operator"; that affiant then called "Chief Operator" and explained that she was unable to get 74342; the Chief operator then told affiant to call up "Information" again and that if the number was correct to call that number again; that affiant then called "Information" again and was told that 74342 was the right number; she then called 74342 again and got

the replies hereinabove set forth.

Further affiant saith not.

, Mrs. M. E. MARSH. [55]

Subscribed and sworn to before me this 25th day
of January, 1915.

[Seal] ROBERT L. HUBBARD,
Notary Public in and for Los Angeles County, State
of California.

[Endorsed]: Civ. No. 363. In the District Court
of the United States, Southern District of Cali-
fornia, Southern Division. Elizabeth Knudsen,
Plaintiff, vs. Domestic Utilities Manufacturing Com-
pany (a Corporation), Edwin R. Crooker, Harry L.
Crooker, Louise E. Crooker, W. P. Ellis and F. W.
Sterling, Defendants. Affidavit of Mrs. M. E.
Marsh. Filed Jan. 26, 1915. Wm. M. Van Dyke,
Clerk. By Leslie S. Colyer, Deputy. [56]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), EDWIN R.
CROOKER, HARRY L. CROOKER, LOU-
ISE E. CROOKER, W. P. ELLIS and F. W.
STERLING,

Defendants.

**Affidavit of Jane C. Orr in Support of Application
for Order of Arrest of Defendant.**

State of California,

County of Los Angeles,—ss.

Jane C. Orr, being first duly sworn according to law, deposes and says:

I am over the age of 21 years and have been acquainted with Elizabeth Knudsen, the above-named plaintiff, for about 15 or 16 years; that in about the month of April, 1914, at the request of Elizabeth Knudsen I undertook to locate the office of the Domestic Utilities Manufacturing Company in the City of Los Angeles; that I found in the Marsh-Strong Bldg., in the City of Los Angeles upon the doors of offices in said building the name "Domestic Utilities Manufacturing Co."; that affiant was then informed and now believes that at that time said company occupied four rooms in said building; that she undertook to enter said office and was met by a man who inquired of her what she wanted and who she wanted to see; that she told the [57] person that she was an agent of the Domestic Utilities Manufacturing Company and wanted to speak to Mr. Edwin R. Crooker; that the person referred to said to affiant, "I have been here a year and your name does not appear upon our books"; that the person referred to stood in the doorway of said offices and affiant did not enter the offices; that she inquired for W. P. Ellis and was told by the person referred to that he was not in.

Affiant further says that on the 23d day of Jan-

uary, 1915, she again called at the Marsh-Strong Bldg., and sought the office of the Domestic Utilities Manufacturing Company, that she went to the rooms formerly occupied by said company in said building; that the name Domestic Utilities Manufacturing Company had been removed from the doors of said offices and she was unable to find any offices in said building with the sign of said company upon them; that she called at the office of the Marsh-Strong Building, found a person in charge thereof, and from that person affiant inquired where she could find the Domestic Utilities Manufacturing Company, and was informed by the person in charge that the Domestic Utilities Manufacturing Company did not occupy any offices in said building and had not occupied any offices in said building for some time past, and affiant was by said person referred to the attorneys of Domestic Utilities Manufacturing Company for information.

Affiant further says that she was acquainted with and in daily communication with Elizabeth Knudsen at the time of the purchase by Elizabeth Knudsen of 1667 clothes-washers from the Domestic Utilities Manufacturing Company on or about the 7th day of July, 1911; that she knows that the said Elizabeth Knudsen bought said clothes-washers and entered into a contract with the Domestic Utilities Manufacturing Company for the purpose of [58] engaging in the sale of said clothes-washers to the public; that immediately after entering into said contract with Domestic Utilities Manufacturing Company, the said Knudsen actively entered upon

the enterprise and began the sale of clothes-washers; that she knows from personal conversation with said Knudsen and hearing the said Knudsen make her plans for the sale of washers, that the said Elizabeth Knudsen contemplated no business in connection with the said contract or with the Domestic Utilities Manufacturing Company except the sale and delivery of said clothes-washers to the public. Affiant further says that she has every reason to believe and does believe that the said Elizabeth Knudsen entered into said contract and into relations with the said Domestic Utilities Manufacturing Company with an honest and fixed purpose to do only a legitimate business in the sale of said washers; that she has good reason to believe and does believe that the said Elizabeth Knudsen never at any time at or about the time of purchasing said contract, or for a long time thereafter suspect or believe that the said business was tainted with fraud or that it was in the nature of an endless chain scheme, or that the business and purpose of said corporation was to sell contracts only, or that said business was other than a legitimate and straightforward business. Affiant further says that the washing-machines manufactured and sold by Domestic Utilities Manufacturing Company are of an excellent character and if offered for sale to the housewives of the country would sell in great numbers and readily; that the excellence of the clothes-washers themselves was calculated to and did induce many women of her acquaintance to engage in an effort to sell the same to the public, and that as she believes if the Domestic

Utilities Manufacturing Company had delivered the washers sold and had been actually engaged in the manufacture and sale of said [59] washers that said business would have been a great success and profitable to all persons engaged in the sale of said washers. Affiant further says that she examined said washers and became fully convinced that they were an excellent article and that they would sell readily to the public. Affiant further says that at all times since the entering into said contract by said Elizabeth Knudsen on the 7th day of July, 1911, affiant has been intimately acquainted and associated with said Elizabeth Knudsen; that she knows that when Elizabeth Knudsen first learned or began to realize that the purpose and object of the company was not to sell washers and other articles, but to sell contracts and reap their profits from the sale of contracts only, the said Knudsen was greatly depressed, disappointed and discouraged, and that said Elizabeth Knudsen immediately took steps to reimburse persons who had invested in said business at her solicitation, and that she continued to reimburse such purchasers until her available funds were exhausted, and affiant knows that said Knudsen has promised and obligated herself to reimburse other persons who suffered losses by investment in said business and in the purchase of said contract and washers through her influence, and that in a number of instances the said Knudsen has given her promissory notes representing the amounts to be reimbursed and has paid and is paying interest on said notes to said persons. Affiant further says that she knows of a number of

instances where the said Elizabeth Knudsen took notes from persons purchasing washers from her and when the said Knudsen learned of the character of said business she surrendered and delivered to the makers of said notes the notes that had been given to her. Affiant further says that she knows that the said Elizabeth Knudsen has converted property belonging to her into money, and [60] has used the money to reimburse persons who suffered loss in said business at the solicitation of said Knudsen. Affiant further says that she knows that the said Elizabeth Knudsen at the time of purchasing said contract and said washers had in bank and otherwise available as much as \$30,000 or more, and affiant knows that at this time the said Elizabeth Knudsen has very little, if any, money, and affiant knows of the said Elizabeth Knudsen having borrowed money with which to meet her expenses during the past 30 days, and affiant further says that the said Knudsen has not engaged in any other business than the enterprise hereinabove referred to during any of the time since the purchase of said contract and washers by the said Knudsen. Affiant further says that she knows that the said Elizabeth Knudsen has spent large sums of money in her efforts to recover from the Domestic Utilities Manufacturing Company and the other defendants in this action, the monies by her paid to them

Affiant further says that Elizabeth Knudsen, the plaintiff in this action, is a person of excellent character and enjoys the confidence and esteem of a large circle of intelligent and well-to-do friends, and affiant

is very sure that the said Elizabeth Knudsen would not knowingly engage in any transaction of a shady or questionable character, and affiant believes that the said Elizabeth Knudsen will, as speedily as she has financial ability so to do, continue to reimburse all persons who lost money in said enterprise through her until they are all satisfied.

Further affiant saith note.

JANE C. ORR.

Subscribed and sworn to this 23d day of January, 1915, before me by the above-named subscriber.

[Seal] RUEBY F. PAULSEN,
Notary Public in and for Los Angeles County, State
of California. [61]

[Endorsed]: Civ. No. 363. In the District Court of the United States, Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company, (a Corporation), Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, Defendants. Affidavit of Jane C. Orr. Filed Jan. 26, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [62]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), EDWIN R.
CROOKER, HARRY L. CROOKER, LOU-
ISE E. CROOKER, W. P. ELLIS and F. W.
STERLING,

Defendants.

**Affidavit of Martin L. Sugarman in Support of
Application for Order of Arrest of Defendants.**

State of California,

County of Los Angeles,—ss.

Martin L. Sugarman, being first duly sworn, on oath deposes and says: That on the 23d day of January, 1915, he visited the Marsh-Strong Building, at the southwest corner of Ninth and Main Streets, in the City of Los Angeles, State of California, for the purpose of ascertaining the whereabouts of the offices of Domestic Utilities Manufacturing Company; that he examined very carefully the "directory of tenants" in the lobby of said building and that said directory did not disclose the name of the Domestic Utilities Manufacturing Company.

Affiant further says that on the 22d day of January, 1915, he had a conversation with one Frank Reeves, at the office of said Reeves, 1112 and 1114 Marsh-Strong Building, Los Angeles, [63] and

that said Frank Reeves stated to said affiant that one Edwin R. Crooker was at the time of said conversation in England.

In said conversation said Reeves stated to said affiant that he had been connected with Domestic Utilities Manufacturing Company in its clothes-washer business and was still connected with said business and with said Edwin R. Crooker; that the Domestic Utilities Manufacturing Company in their clothes-washer business had in fact nothing to sell, except paper and that it had no commodity to place in the hands of its agents; that he, the said Reeves, had a proposition that he was going to put on the market and that would beat the Crooker Clothes-Washers Proposition 300%. Said Reeves further said to said affiant, that Edwin R. Crooker has made two and a half million dollars out of the clothes-washer proposition.

Affiant further says that said Reeves said to affiant: "I have the brains of the clothes-washer proposition now in my company, F. W. Sterling, who was with Crooker in the clothes-washer business and who was the brains of that proposition is now associated with me in my proposition."

Affiant further says that said Reeves told affiant that he, the said Reeves, had taken in as much as \$3,000.00 in checks through the mails in a single day while he was in charge of said clothes-washer business for the Crookers.

Affiant further says that said Frank Reeves said to affiant at said time and place: "If you want to invest some money in the clothes-washer business I

can arrange that for you, but take my advice and put your money in my proposition.”

Further affiant saith not.

MARTIN L. SUGARMAN. [64]

Subscribed and sworn to before me by the above-named subscriber, this 25th day of January, 1915.

[Seal]

ANDREW M. STRONG,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Civ. No. 363. In the District Court of the United States, Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company (a Corporation), Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, Defendants. Affidavit of Martin L. Sugarman in Support of Application for Order of Arrest of Defendants. Filed Jan. 26, 1915. Wm. M Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [65]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), EDWIN R.
CROOKER, HARRY L. CROOKER, LOUISE
E. CROOKER, W. P. ELLIS and F. W.
STERLING,

Defendants.

Affidavit to Obtain Order for Arrest of Defendants.

State of California,

County of Los Angeles,—ss.

Elizabeth Knudsen, being first duly sworn according to law, deposes and says: That she is the plaintiff above named.

That she is informed and believes, and upon such information and belief states the fact to be that the defendants and each of them are about to depart from the State of California, and from the United States, with intent on the part of each and all of the above-named defendants to defraud the creditors of the Domestic Utilities Manufacturing Company, and she further says, that her said information and belief is founded upon the following facts:

That Domestic Utilities Manufacturing Company is a corporation, organized and existing under and by virtue of the laws [66] of the State of California, and at all times mentioned in this affidavit has had and maintained its principal place of business in the City of Los Angeles, in the County of Los Angeles, and State of California.

That the defendants Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, and each of them have been, at all times mentioned in this affidavit, and each of them now are, residents and citizens of the State of California.

That on, to wit, the 7th day of July, 1911, at the City of Los Angeles, in the State of California, affiant entered into a contract in writing with the defendant, Domestic Utilities Manufacturing Com-

pany, a copy of which said contract is hereunto attached, marked exhibit "A" and made a part hereof.

Affiant is informed and believes, and upon such information and belief says, that on said 7th day of July, 1911, the defendants Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling and each of them were, and that at all times mentioned in this affidavit, they and each of them have continued to be and that each and all of them now are, members and stockholders in the defendant corporation, Domestic Utilities Manufacturing Company, and that at all times mentioned in this affidavit, all of said individual defendants have been and now are directors and officers, or directors or officers of said Domestic Utilities Manufacturing Company, the defendant corporation, but that she is unable to say, for want of knowledge, during what period or periods of time any of said persons acted as directors only, or as officers only or as both directors and officers of said corporation defendant, with greater particularity [67] or certainty, but she is informed and believes and upon such information and belief says, that on said 7th day of July, 1911, the defendant W. P. Ellis was the secretary of said corporation, and on said date was performing and did perform the duties of said office, and did, on said date, and as such officer, subscribe his name to said contract, exhibit "A," herein set forth by copy, and did on said date, and as such officer attach the name and official seal of Domestic Utilities Manufacturing Company to said written contract. She further says that at the time of the making of said contract

on said date, she subscribed her name thereupon as a party thereto.

Affiant further says, that before, and at the time of, the signing of said contract by said corporation and this affiant, said corporation, by and through its officers, the individual defendants herein, had caused to be written, printed and publicly circulated divers and sundry papers, circulars, documents, booklets, prospectus and letters, wherein and whereby the defendants and particularly the defendant corporation offered for sale and offered and proposed to sell to members of the public, certain therein described clothes-washers, ovens and flues, and certain therein described patent rights and territorial rights and the right to purchase and to sell, at wholesale and retail, said washers, ovens, flues and to sell patent rights and territorial rights to others. That affiant received and read divers and sundry of said papers, circulars, documents, booklets, prospectus and letters and read them before entering into said contract, and that she believed and relied upon each and every statement contained in said papers, circulars, documents, booklets, prospectus and letters, and so believing and relying thereupon, [68] entered into and executed said contract as aforesaid, and purchased from the defendant corporation 1667 vacuum clothes-washers and paid defendant corporation therefor the sum of \$5,000.00

That she replied upon the promises and agreements set forth in said contract and each of them, and so relying thereupon entered upon the business of selling said clothes-washers in wholesale lots and

at retail, and in accordance with the terms of her contract and at the prices and on the terms and under the conditions required by the terms of her said contract with the defendant corporation; that in entering upon and prosecuting the said business, she was put to large outlay and expense which she laid out and paid from her own private funds; that she employed other persons and paid them for their services; that she spent large sums of money in traveling from place to place and in selling large numbers of said washers; that she established throughout the United States, at a number of cities, suitable and sufficient places of business wherein to conduct the business of selling said washers; that in establishing said places of business, she paid out large sums of money for rents, leases and in fitting up said places of business; that she established at various cities in the United States, factories for the manufacture of said washers and paid out and expended large sums of money in so doing, to wit, the sum of \$34,531.02; that she advanced and paid to said defendant corporation Domestic Utilities Manufacturing Company large sums of money in payment for large numbers of said clothes-washers, to wit, \$13,005.00, and ordered the said Domestic Utilities Manufacturing Company to deliver to her said washers, by shipment thereof to various persons and to various points throughout the United States, but which said washers were never delivered to [69] her by said Domestic Utilities Manufacturing Company; that she was compelled to and did reimburse the losses of other persons to whom she had sold washers under

said contract in the sum of \$16,873.50, and devoted two years time to said business at a loss to her in time of the value of \$6,000.00.

That in all things and in each and every particular, affiant kept, carried out and performed the said contract so entered into on said 7th day of July, 1911, by and between affiant and said Domestic Utilities Manufacturing Company, the defendant corporation herein, but that the defendant corporation Domestic Utilities Manufacturing Company disregarding its said agreements and said contract, utterly failed, neglected and refused to keep, carry out or perform *it* said contract with affiant, and failed and refused to deliver to affiant or to ship to her order the 1667 vacuum clothes-washers so bought by affiant from defendant corporation, or any part or portion thereof, though often demanded after the same were due, by the terms of said contract, to be delivered to affiant; that said defendant corporation, on divers and sundry occasions shipped and delivered to customers of and purchasers from this affiant, defective, damaged and unsalable clothes-washers, and clothes-washers that were utterly worthless and unfit for sale or for use or for any purpose whatever, and in insufficient quantities and less than were ordered and paid for by affiant to said defendant corporation; that the defendant, Domestic Utilities Manufacturing Company likewise failed, neglected and refused to deliver to affiant, and refused to ship to her order, as required by the terms of said contract more than or about 30,000 of said vacuum clothes-washers which had been sold by affiant to members of the public,

customers of affiant; that she sold in all, more than 36,000 of said washers; that the [70] defendant corporation never did deliver to affiant more than 4,000 of said washers. Affiant further says that the defendant corporation during about one year from and after the said 7th day of July, 1911, continually and repeatedly failed to deliver to affiant or to ship to her order, clothes-washers sold by her, and until she had sold and had become obligated to deliver to her purchasers about 7,000 of said washers, and that, in order to carry out her agreements and contracts with her said customers and purchasers, and to avoid failure upon her part to perform her every agreement with her said purchasers, and to act in perfect good faith with said purchasers, she was compelled to and did establish manufactories and was compelled to and did manufacture washers with which to fulfill her said agreements; that during said time of about one year, above mentioned, the defendant corporation by and through its officers and members, the individual defendants herein pretended to be unable to manufactures said washers for said trade or to meet the demands of the public or to comply with its said contract with this affiant and other contract holders holding contracts with said defendant corporation of the same nature as the contract held by affiant, and in that regard says:

That the defendants Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, co-operating one with the other and confederating together, conspired to deceive, to cheat and to swindle this affiant and others by means of

and through the agency of said papers, circulars, documents, booklets, prospectus and letters and their contents so written, printed and publicly circulated by the defendants as hereinabove alleged, and by means of the contents of said contract [71] of July 7, 1911, to cheat, to defraud, and to swindle this affiant, and to that end represented, stated, set forth and pretended in all said documents, and by the contents thereof lead readers thereof to believe, that said Domestic Utilities Manufacturing Company was actually and really engaged in the manufacturing and sale, at wholesale and retail, of vacuum clothes-washers, ovens and flues, to its agents and their customers and the public; that said statements and pretenses and representations in all said documents and in said contract were false, and were a sham and deceit, and worked a fraud upon affiant, in this, that defendant corporation was not, nor had it ever been actually or really manufacturing for sale for selling, either at wholesale or retail, said washers, ovens or flues, or any of said articles, except that said defendant corporation manufactured a few of said washers, ovens and flues for the mere purpose of show and not for delivery to buyers or to its agents, or their purchasers, and in that regard she says:

That she is informed and believes, and upon such information and belief says, that the defendants have caused to be manufactured all told, only a few thousands of said washers, in no event exceeding 500,000 of said washers; that defendant corporation sold about 10,000,000 of said washers; that to fill the con-

tracts actually sold by said defendant corporation and to deliver all washers which, by the terms of the contracts actually sold by said defendant corporation to its agents and their purchasers and the public, said defendant corporation became obligated to deliver, and promised and agreed to deliver as many as ten millions of said washers. [72]

That instead of being actually and really engaged in the manufacture and sale of said washers and other articles, the said defendant corporation made a pretense so to do as a mere blind, shield or screen to its real business and objects, which were, to sell its said contracts, such as the one that is set forth in this affidavit, to members of the public and inducing the original purchasers of said contracts to sell other contracts like them and subcontracts as provided for in all said contracts, and to reap a portion of the purchase price of each of said resold contracts for the benefit, gain and enrichment of the defendant corporation, without the intention on the part of said corporation to deliver the washers or other articles ordered by the buyers of said original or resold or subcontracts.

That in furtherance of said scheme, and for the purpose of carrying out its plans and purposes of swindling the public, its agents and particularly this affiant, the defendant sought by every means in *their* power to encourage the sale of contracts like the one herein set forth, and to discourage in every way possible, the actual sale to the public, by its said agents and their subagents, of said washers and other articles, and in that regard, and with ref-

erence to the contract so sold by said defendant corporation to this affiant and with reference to the dealings between said corporation and its officers, and the individual defendants herein, and this affiant, and in carrying out the scheme and plan of said defendants to cheat, to defraud, and to swindle this affiant, affiant says:

That at all times after the purchase of said contract herein set forth from defendant corporation, the defendants [73] and each of them have hindered and prevented her from doing the business therein contemplated, by refusing and failing to deliver the washers by her purchased from the defendant corporation, and she says said washers have never been delivered to her.

Affiant says that she purchased from said defendant corporation and paid to defendant corporation \$13,003.00, the full price of 12,337 vacuum clothes-washers, which she had sold and agreed to deliver to others.

That the defendant corporation received said sums of money in payment for said several lots of washers; that after receiving the money purchase price thereof from affiant, the defendant corporation failed, neglected and refused to deliver said washers or any of said lots of washers or any part thereof, and none of said washers have ever been delivered by the defendant corporation or by anyone for it, to affiant or to her purchasers or to any person or persons for her or for them; that at the time of and after the purchase and payment for each of said lots of washers and repeatedly thereafter, affiant

demanded of the defendant corporation the delivery of all said washers; that defendant corporation failed and refused to deliver said washers or any of them and still fails to deliver the same or any part thereof; that affiant has repeatedly demanded the repayment of the said several sums of money so paid by the affiant to defendant corporation for said several lots of washers; that the defendant corporation has failed and refused and still fails and refuses to repay to affiant said sums of money or any of them or any part thereof, and still retains and keeps all said money. [74]

That affiant established factories and salesrooms in the City of Chicago, Illinois, and in the City of New York, New York, and salesrooms in the cities of Portland, Oregon, Salt Lake City, Utah, Denver, Colorado, Toronto and Vancouver, Canada, wherein and whereby to supply said washers to persons to whom she had sold said washers; that said factories and salesrooms and factories were established by her with the consent and authority of the defendant corporation; that after she had established said factories and salesrooms and had begun to manufacture said washers in said cities for said purpose defendants set divers and numerous persons into said City of Chicago, and into said City of New York and into each city where she established said factories and salesrooms and offered through said persons to sell to and to supply the public with said washers at and for the price of forty cents each; that said price was less by more than one-half than affiant was permitted, by the terms of her said contract with said defendant cor-

poration to buy said washers from said corporation; that by the terms of said contract, affiant and her subcontractors were prohibited from selling any of said washers at retail, or the family right to use the same for less than \$3.50 for each washer for the first or initial sale, and \$1.50 for each washer for subsequent sales, and the right to use washers so purchased was limited to the one family purchasing the right and such washer or washers; that the offering to sell said washers to the public by the defendants at such low price was intended to prevent, and did prevent affiant from finding purchasers for washers offered by her for sale at \$3.50 each or \$1.50 each as above alleged, and prevented affiant from carrying out the business of selling said washers as by the terms of her contract she had a right to do; that affiant was, by the [75] offering by the defendants to sell said washers at such low price in said markets as aforesaid, completely driven out of business at said cities of Chicago and New York and elsewhere in cities above named, and was caused great damage thereby.

That after affiant had secured permission and authority from the defendant corporation to manufacture said washers with which to supply those who purchased the same from her, and after she had expended large sums in establishing said factories and salesrooms in said several cities, and after she had paid out and expended large sums of money to effect the sale of said washers, and at a time when affiant had built up a large and profitable business in the sale of said washers, defendants, in furtherance of their said conspiracy and with the design of driving

affiant out of the business of manufacturing said washers for actual sale to the public, and with the design and purpose of crippling her financially and preventing her from getting any profits from said business and to cheat, to defraud and to swindle her out of her money affiant had paid for her said contract and said 1667 washers and for contracts paid for by affiant to the defendant corporation for the contracts and washers sold to other persons by her, wrongfully and willfully caused to be written, printed and circulated through the United States mails, and as affiant is informed and believes, and upon such information and belief says, to the extent of many thousands of copies, a circular letter in the words and figures set forth in one of said circular letters hereto attached and made a part of this affidavit and marked and designated exhibit "B." That the defendant corporation had not, previous to sending out said circular or at all, canceled affiant's right to manufacture said washers, nor had it notified affiant of any such action on its [76] part, but on the contrary said defendant corporation up to the time of sending out said circulars had been acknowledging, and at that time was acknowledging, and for a long time thereafter continued to acknowledge to affiant right and authority to manufacture said washers and her right and authority to sell the same and to deliver said washers to purchasers; that no such letter or notice as is stated or described in said circular letter, exhibit "B," to have been sent to or given to affiant was ever received by her, and, as affiant is informed and believes and upon such

information and belief says, no such letter or notice was ever sent to or prepared to be sent to affiant by defendants. She further says that the person named and referred to in said circular as H. L. Crooker never, at any time or place called upon affiant for the purpose set forth in said circular or for any like purpose. That said circular was wholly false and misleading and was wrongfully and willfully and viciously prepared and sent out by defendants to prevent affiant from carrying forward the business of actual manufacture and actual sale of said washers and for the further purpose of carrying out the scheme plan and conspiracy of defendants to cheat, to defraud and to swindle this affiant out of the money so paid by affiant to the defendant corporation, and to drive her out of business of actually manufacturing and actually selling said washers to the end that the defendants would thereby be the better enabled to cheat, to defraud and to swindle other persons, by selling to them contracts like the contract herein set forth by exhibit "A." That the sending out of said circular as aforesaid did injure affiant, and did destroy her said business, and deprived her of the confidence of the public and of her customers and her agents, and did cause her great loss and damage in money, as herein set forth. [77]

Affiant further says, that the defendants, Edwin R. Crooker, and H. L. Crooker and each of them, in furtherance of said conspiracy to cheat, to defraud and to swindle this affiant, openly and in a public meeting held by said Crookers in the Marbridge Building, at 34th and Broadway in the City of New

York, on or about April, 1913, and in a public meeting held by said Crookers in the Longacre Building at 42d and Broadway in said city and at other like meetings, in the City of New York and at several places in the City of Chicago, declared that this affiant had never had authority from the defendant corporation to manufacture said washers at any place; that said statements so made by said defendants Edwin R. Crooker and H. L. Crooker were false and were viciously made by them to injure and damage affiant, and to prevent her from carrying out her said contract and to ruin and drive affiant out of said business of actually manufacturing and actually selling said washers, as she had a right to do.

That before and at the time of the purchase of the said contract and said washers by affiant from the defendant corporation, the defendant Harry L. Crooker and Edwin R. Crooker and W. P. Ellis represented and stated to affiant that the defendant Domestic Utilities Manufacturing Company had procured and was the owner of patents and patent rights in Canada, the Argentine Republic, France, Germany, Russia, Norway, Denmark, Australia, Austria, Italy, Switzerland and other foreign countries and had the right to manufacture and sell in each of said countries the said vacuum clothes-washers and ovens. Affiant believed said statements and replied thereupon, and bought said contract and said washers with the intention and purpose of selling said washers and ovens in some or all of said countries and of [78] manufacturing said washers and ovens in many of said countries; that said repre-

sentations and statements were false; that said defendants knew them to be false at the time they were made by them; that said statements and representations so made by them were made to deceive this affiant and to induce her to pay her money to the defendant corporation; that affiant did not then know, nor did she learn of the falsity of said statements and representations until about March, 1912, when and after she had paid out and expended large sums of money in establishing a business in the City of Toronto, Canada, for the purpose of manufacturing and selling said washers in Canada; that before she expended any money in establishing her said business in said City of Toronto she applied to and received from the defendant Domestic Utilities Manufacturing Company, permission to manufacture and sell said washers in Canada; that after she had received such permission, she relied upon the representations of the defendants H. L. Crooker, Edwin R. Crooker and W. P. Ellis, so made to her and went to Canada on or about March, 1912, and then learned that said Domestic Utilities Manufacturing Company had secured no patents or patent rights in Canada, and had not any right whatever to manufacture or to sell said washers or said ovens in Canada; that affiant was not premitted by the laws of Canada to manufacture or sell in or to import to Canada for sale any of said ovens or washers, and was thereby greatly damaged and suffered large financial loss.

Affiant further says that in about July to December, 1912, she undertook to do business in Russia, Switzerland, France, Austria, England, Germany,

Norway, Denmark, Australia and Italy, in the manufacture and sale of said washers; that she investigated and in each of said countries learned that the defendant corporation [79] had not, at any time, either before or on or after the date, July 7, 1911, acquired, nor had it ever owned or had the right, by patent or otherwise in any of said countries, to manufacture or to sell said washers in said countries or any of them. That affiant in her efforts to carry on the business of selling said washers in said foreign countries expended large sums of money and all at great loss to her financially.

Affiant further says, that the acts of hindrance and obstruction and the many acts of deceit and fraud above set forth are but a small part or portion of the like or similar acts committed by the defendants against this affiant; that all said acts and things done by said defendants to and for the hurt and injury of affiant and her said business, were done and performed by defendants as part of a general scheme and plan of the said defendants to avoid the performance upon their part and upon the part of said defendant corporation, of the agreements and promises upon the part of said defendant corporation made in said contract of July 7, 1911, and herein sued upon, and to hinder, delay and annoy affiant in the performance of, and if possible, to prevent affiant from performing the said contract upon her part, and to prevent the actual manufacture and actual sale of said washers, by affiant, or through her said subagents in order that defendants might the more successfully ply their business of selling and reselling

said contracts on a mere pretense that the washers in each contract so sold and described would be delivered in the future, without any intention upon the part of defendant or any of them that the washers described in said contracts should ever be delivered at any time or place.

Affiant says that from the first she believed the said business was a legitimate and profitable business and that it [80] was a business capable of being developed and made permanent, and so believing persisted in her efforts to make the said business succeed in spite of the opposition of defendants herein; that she continued in that belief until in about September, 1913, when she discovered that the defendants were not sincere in making said contract and were trying to avoid the consequences of their agreements and promises by them made and by the said contract required to be performed upon the part of defendants, corporation and individuals. That in September, 1913, she made complaint against Domestic Utilities Manufacturing Company and the individual defendants herein, before the Postal authorities of the United States; that an investigation was ordered and was conducted before and by W. H. Lamar, Assistant Attorney General of the United States; that the Domestic Utilities Manufacturing Company, and the individual defendants herein, were called upon by said department to show cause before said department why a fraud order should not be issued against them; that the defendant Domestic Utilities Manufacturing Company appeared before said department and before the said W. H. Lamar, Assist-

ant Attorney General, and were given a hearing; that at the conclusion of said hearing it was determined by said department that the selling plan involved in the contract issued by defendant Domestic Utilities Manufacturing Company to the affiant herein, to wit, exhibit "A," hereto attached, and other like contracts issued by said defendant corporation to others was and were in conflict with the postal fraud and lottery statutes of the United States on the ground of being an endless chain scheme; that defendants were forbidden by said department to issue any more such contracts. She further says that the defendant corporation herein, acting by and through the individual defendants hereinabove named, has disregarded said determination and order of said department [81] and has continued and is continuing to issue said contract, as affiant is informed and believes.

That the defendants and each of them, although often requested by this affiant so to do, have failed and refused and still fail and refuse to repay to affiant any of the sums of money so by her paid to said Domestic Utilities Manufacturing Company, or any part thereof, and have refused and still refuse to pay to affiant any of the sums outlaid and expended by her or any part thereof, or to reimburse her for her losses by them occasioned and caused and by the defendants inflicted upon affiant, or any part thereof.

That it has been the universal and continuous practice of the defendants to cause to be issued to each purchaser of washers, ovens or fouses from defendant corporation, pretended and so-called warehouse re-

ceipts wherein it was recited and set forth that said purchasers were the owners and entitled to receive upon demand, the number of washers, ovens or flues stated in said so-called and pretended warehouse receipt, whereas in truth and in fact, no such washers, ovens or flues or any of them were ever on hand or in storage or in any warehouse, or even at any time existed; that such warehouse receipts, so-called, were delivered to affiant at the time of such purchase of washers made by her as aforesaid; that she often demanded of defendants the delivery of the washers in said receipts described; that in each and every instance, defendants failed and refused to deliver said washers or any of them to affiant and that she never did receive any of said washers.

Affiant further says, that the defendants have secured, by means of executing contracts of the same character of the contract herein set forth and sued upon and marked exhibit "A," in great numbers, and as affiant is informed and believes and upon such [82] information and belief says, defendants issued and caused to be issued many thousands of such contract, and that it has been the policy and plan of the defendants in each and every case to secure payment for said contracts and the washers, ovens or flues therein described and then to refuse to deliver said articles or any of them, or to deliver to the purchaser anything whatever; that many thousands of persons have, by the said plan and scheme been swindled by defendants out of their property and money and have been reduced to penury and want; that the defendant corporation and the individual defendants herein have practically at all times since the com-

mencement of business, and particularly during the past year, kept its and their money, property, both real and personal, and other effects hidden and covered up and out of the reach of legal process and secure in secret vaults and places of safety and seclusion known only to the defendants; that as affiant is informed and believes and upon such information and belief says, the said Domestic Utilities Manufacturing Company has property upon which seizures under the process of this court could be made, if the same can be found, and that the individual defendants herein have, as affiant is informed and believes, much property within the reach of the process of this court, but that all said property is hidden and secreted, so far as affiant has been able to ascertain. That all property owned by the individual defendants was acquired through the methods herein described. Affiant further says, that it is her belief that the defendants and each of them will, immediately upon learning of the filing of this action, absent themselves from the jurisdiction of this court, and will leave the State of California, and the United States, and avoid the service of writs and processes issued out of this court, upon them, and that they and each of the defendants will dispose of, [83] hide, secrete and remove any and all kinds of personal property by them or by any of them owned, and will, so far as in their power, hide and obliterate all evidence by means of which the monies and properties of the defendants and each of them could be located and reached. And will, if within their power, put all their property of every kind and nature beyond the reach of the process of this court. Affiant further

says that she has no adequate remedy for enforcement of any judgment she may secure in this action or for the protection of her rights in the premises—that the amount herein sued for is justly due from the defendant Domestic Utilities Manufacturing Company, and that the indebtedness became due through the fraud, deception and conspiracy of the said several individual defendants, and that she is in equity and good conscience entitled to recover the same from defendants. Affiant further says, that the said several defendants have repeatedly declared that no court could reach them or compel them to make restitution or to redress the wrongs by them committed; that the debt due from the defendant to affiant will be greatly endangered by the defendants departing from the jurisdiction of this Court and that the concealment of the property of the defendant corporation by the said several individual defendants is done, and has been done, and will continue to be done in the future, for the sole purpose of defrauding this affiant and others of sums of money justly due from the defendant corporation, and in furtherance of the plan, scheme and conspiracy of the several defendants to cheat, to defraud and to swindle this affiant and all other persons standing in a similar relation to the defendants herein by reason of having entered into similar contracts with defendant corporation through and by and under the management, control, direction, persuasion and inducement of [84] the said individual defendants herein, in manner hereinabove set forth and alleged.

That affiant was induced to enter into the contract sued upon in this action through the fraud, decep-

tion and false statements and representations made to her, the said affiant, by the defendants Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, as the agents, officers and representatives of the Domestic Utilities Manufacturing Company, committed, practiced and done and made at and before the entering into said contract by affiant, and by the terms of said contract itself, and plaintiff has on numerous occasions heretofore demanded of the defendants and each of them the redress of the wrongs done her by the defendants, and each of them, and has repeatedly told defendants that she would institute legal proceedings for the recovery by her of the sums paid by affiant to defendants under said contract, and for damages for the breach thereof; That defendants have repeatedly said to affiant that no court could reach them or compel them to make restitution or to redress the wrongs by them committed against this affiant and that the said defendants and each of them have, almost from the commencement of business by the defendant corporation, kept the property and assets of said corporation hidden, secluded, and so far as possible out of the reach of process of courts, and have kept the money of said corporation and their own money in private vaults and other secret places where the same could not be reached by the processes of law, and that Edwin R. Crooker, one of said defendants, has even threatened this affiant with violence and bodily harm, if she made further attempt to recover the monies due her.

Affiant further says, that the damages complained of [85] resulted from the breach of the contract

herein sued upon and were directly caused her by the confederation and conspiracy of the several individual defendants hereinabove named, co-operating, one with the others, to cheat, to defraud, and to swindle this affiant and to prevent her, the said affiant, from doing business as by the terms of said contract she had a right to do, and to completely ruin her financially and render her unable to seek redress through the courts for the wrongs done her by the several defendants.

Affiant further says, that the defendants, and each of them, have been guilty of a fraud in contracting the debt and in incurring the obligation for which the above-entitled action is brought.

Affiant further says, that the defendants and each of them have removed, have disposed of and have hidden, secreted and kept in secret places, the property of the defendant corporation, Domestic Utilities Manufacturing Company, and the property of each of the said several individual defendants for a long time prior to this date with intent to defraud the creditors of the defendant Domestic Utilities Manufacturing Company, and of them, the said several individual defendants, and particularly to defraud this affiant.

Affiant further says, that she makes this affidavit under the provisions of Sections 478, 479, 480, 481, and 482 of the Code of Civil Procedure of the State of California, and that she seeks thereby to secure an order of this Court for the arrest of the defendants, Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, and their detention until they and each of them give security

or bail under the provisions of the foregoing sections and under Sections 483, 484, 485, 486, 487, 489, 490 and subsequent sections to and [86] including Section 504 of the Code of Civil Procedure of the State of California, and under the Statutes of the United States in such case made and provided.

Affiant further says, that she is informed and believes and upon such information and belief says that whatever property is owned or claimed to be owned by the defendants, Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, was, by them acquired through the promulgation and practices *and practices* of fraud and deceit in the management and control of the defendant Domestic Utilities Manufacturing Company, and is in fact the property of the Domestic Utilities Manufacturing Company, and that the same should be subjected to the payment of debts and obligations of the Domestic Utilities Manufacturing Company.

Affiant further says, that she is informed and believes and upon such information and belief states the fact to be that the defendants, Edwin R. Crooker, and Harry L. Crooker, are the prime and chief instigators and perpetrators of the deceits, and frauds done and practiced by the Domestic Utilities Manufacturing Company upon this affiant and others, and that said two defendants have appropriated to their own use and benefit so by them and the other defendants herein made, done and practiced, and that said Edwin R. Crooker and Harry L. Crooker do not abide or remain in any one place for any considerable length of time but are for the most part and for the greater part of time traveling from one State to an-

other within the United States, and from the United States to foreign countries in carrying forward the business of defendant Domestic Utilities Manufacturing Company along the lines and upon the plans in this affidavit set forth and to the ends and purposes of acquiring money by deceit and fraud in the manner more particularly hereinabove set forth. [87]

Affiant further says, that the defendants Edwin R. Crooker has repeatedly stated within the past sixty days, to persons in the City of Los Angeles, that he intended to go to England to remain indefinitely.

Affiant further says that she is informed by persons whom she believes to be trustworthy and reliable, that at this time the defendant Edwin R. Crooker is hiding in the vicinity of Los Angeles, and is in daily communication with the defendant Louise E. Crooker at her home. That the defendants Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker and W. P. Ellis are at this time preparing for immediate departure from the United States by steamer for Australia with the intention of remaining permanently out of the United States, and that if these defendants are not prevented from sailing and succeed in getting out of the United States, she will forever lose all opportunity and every chance of securing redress for the wrongs done to and the fraud practiced upon her by the defendants herein. She is further informed that the defendant Edwin R. Crooker, to avoid service of process upon him and to escape discovery by creditors of said defendant corporation and by persons defrauded by the said Crooker and the other defendants herein, is hiding in the mountains near the City of Los Angeles.

Affiant further says that her information concerning the hiding of said Edwin R. Crooker was gotten in the following manner; a man who is engaged in business in the City of Los Angeles called affiant over the phone, asked her if she were Miss Knudsen, and whether she was at this time trying to find the said Edwin R. Crooker and others connected with the Domestic Utilities Manufacturing Company; affiant replied that she was [88] seeking those persons and had been for a long time; that the person speaking to her over the phone as above set forth, said in substance: "I know where Edwin R. Crooker is, and if you want to get him, I can tell you how to do so, but if you do want to get him, you will have to act quickly for the reason that he and his family and others of the defendants are preparing to leave the United States, and are getting their affairs in shape to sail for Australia in a very short time"; that the said Edwin R. Crooker was in daily communication with his wife who was at that time at the home of said Crooker and being 962 Gramercy Drive in the City of Los Angeles; that he got his information from a member of his own family who was connected in a business way with the said Crookers and other defendants herein and that the fact of the connection of the said member of this family with said Crookers had caused a great deal of trouble in his family and to him, and that for that reason he would not consent to the use of his name in connection with this action or at all, and stated to affiant that he knew the Crookers to be very vindictive, and that he believed they would do him great harm if they knew

that he had furnished affiant with information. Affiant further says that the party would not give her his name and stated that it was for the reasons above given. Affiant further says that the person speaking to her over the phone told her that Edwin R. Crooker was hiding in the mountains at some point on Mount Wilson, and that he was keeping under cover at that place to prevent his presence in Los Angeles County being known. Affiant further says that she has good reason to believe that she knows who the person speaking to her over the phone as above set forth, is, but that she does not desire to disclose his name or business in view of the statements made to her by such person, and out of a desire not to cause others trouble or annoyance with her affairs. [89]

Affiant further says that during the past twelve months she has repeatedly endeavored to locate the said Edwin R. Crooker and Harry L. Crooker and has repeatedly failed, but that within the last thirty days she had a conversation with a business man of the City of Los Angeles, and that the person referred to has had many dealings, and has done much business with and for the Domestic Utilities Manufacturing Company; that said person was reluctant to give affiant any information concerning the said company or the said Crookers and would not do so until affiant promised him that she would not in any way use his name in connection with this litigation; that she did promise not to use his name; that thereupon the person referred to told affiant that he had seen and talked with Edwin R. Crooker in the City of Los Angeles on or about the 20th of December,

1914; that the said Crooker had told him that he was preparing to leave the United States and to go to England where he expected to carry on business. Affiant further says that the person referred to at that time told her that he was about to get his business matters with the Domestic Utilities Manufacturing Company and the said Crookers fixed up so that he would not lose anything, and that he did not want to do anything that would make the Crookers angry at him, and feared that if his name was mentioned it would cause him great loss, and stated that he knew the Crookers to be so vindictive that they would not hesitate to do him injury if they were to find out that he had said anything about their affairs. Affiant further says that the person above referred to at the said time and place told affiant that the said Edwin R. Crooker had told said person that he, said Crooker, had just returned to America from England and that in England he was doing an excellent business, and was anxious to return to England because on the day that the war broke out, [90] he, the said Crooker, was about to close a \$100,000 deal; that said Crooker told him that in England the old business was very good, but that they were going to use the same old plan and contract that they used here in connection with the sale of clothes-washers, ovens and flues, and in the United States were going to operate with new and different scheme in connection with other articles.

Affiant further says that at various times during the past sixteen months she has tried to get service upon Edwin R. Crooker and Harry L. Crooker in an effort to get redress for the wrongs done her through

the court, but that in each instance the said Crookers have eluded service and have departed from the places where she sought to prosecute actions against them before service could be had upon them, and in this regard says, that in December 1913 she employed attorneys and paid them for their services in the preparation of the suit against the said Edwin R. Crooker and Harry L. Crooker in the City of Washington, D. C.; that during the hearing which was being conducted by the Honorable W. H. Lamar, and Assistant Attorney General of the United States, the said Edwin R. Crooker was given evidence before the said Lamar; that said hearing was continued at the noon recess and in the midst of the giving of testimony by said E. R. Crooker, that affiant had prepared an action against the said Crookers and was nearly ready to file and serve said action upon the said Crookers, and that as affiant believes the said Edwin R. Crooker became aware of her intentions in that regard and immediately left the City of Washington and did not return to conclude his evidence at said hearing, and affiant was unable to locate the said Crooker or the said Harry L. Crooker again until January 1914; that on said last mentioned date the said Edwin R. Crooker and the said Harry L. Crooker were in the City [91] of New York, that affiant learned of their presence in said city, that affiant employed counsel, and in conjunction with others who had employed an attorney by the name of Hammerman, caused a suit to be prepared for filing and service upon the said Crookers in the said City of New York; that as

affiant believes the said Edwin R. Crooker and Harry L. Crooker again learned that suit was about to be commenced against them, and that said Crookers either left the City of New York or concealed themselves therein and service could not be had upon them, nor could they be found thereafter. Affiant further says that in October 1913 the said Edwin R. Crooker and Harry L. Crooker were in the City of New York, that at that time plaintiff met said Crookers in said City of New York; that she employed James W. Osborn, an attorney at law, and through him attempted to secure a settlement or recovery from the said Crookers, that affiant and said Osborn had a conference with Lucius Varney, who at that time represented the said Edwin R. Crooker and Harry L. Crooker as their attorney, and that immediately after the said conference the said Crookers disappeared and affiant was unable to either get settlement or to get service in either proceedings against them. Affiant further says that for more than six months she has had in her employ an attorney in the City of Los Angeles, and that every effort possible has been made to locate the said Edwin R. and Harry L. Crooker to the end that legal proceedings might be commenced against them in connection with the Domestic Utilities Manufacturing Company in favor of this affiant; that all efforts to locate the said Crookers or to get service upon them *has* been unavailing, and that unless affiant is able to get service on said Edwin R. and Harry L. Crooker at this time, and before their departure from the United States she fears that she

will never be able to recover her money or any redress for the wrongs done her by the said [92] Crookers and the said defendants herein. Affiant further says that at all times since about December 1913, affiant has retained and kept employed M. Walton Hendey, an attorney in the City of Washington for the purpose and to the end of apprehending and procuring service of process upon the said Edwin R. and Harry L. Crooker should they make their appearance in said City of Washington or in that vicinity; that said Hendey has been unable during all said time to find the said Crookers in said city or to learn of their presence in the east and as affiant is informed and believes, she states the fact to be that both said Edwin R. Crooker and said Harry L. Crooker have for the past year been out of the United States and in foreign countries.

Affiant further says that she has realized no profits and has had no benefits whatever either financially or otherwise from the sale of contracts in connection with the business of Domestic Utilities Manufacturing Company, and has made nothing by the transaction, either in money or property or otherwise; that her relations with said Domestic Utilities Manufacturing Company *has* been a source of constant worry, distress, embarrassment and financial loss; that as soon as she learned of the real purposes and practices of the said Domestic Utilities Manufacturing Company and its officers, the individual defendants hereinabove named, she ceased trying to do business under her said contract and immediately sought by every means at her hand to

reimburse persons who had lost in said enterprise at her solicitation, and that she had devoted her entire time during the past sixteen months to the business of correcting and undoing the error made by her in engaging in said business and in reimbursing those who lost in said enterprise through her influence and in trying to bring the said Domestic Utilities Manufacturing [93] Company and the other defendants herein to justice. Affiant further says that she sold a number of *contract* and took the promissory notes of the purchasers for the said contracts and washers sold by her, and paid to the Domestic Utilities Manufacturing Company in money that company's proportion of the proceeds of said sales, and that she has in every instance so far as her financial ability would permit, *reimburse* such purchasers in money, where money was paid, and has canceled and redelivered said notes where notes were given, and when she became unable further to reimburse said purchasers in money, has executed her own note and other obligations, and has agreed to repay and reimburse each and every purchaser from her, and is paying large sums in interest on obligations so given by her. That in other instances she has reimbursed said purchasers to the extent of all money or other thing of value received by her and has obligated herself to reimburse the amounts or portion that went to said Domestic Utilities Manufacturing Company.

Affiant further says that at the time of the purchase of said contract and said washers by her she dealt directly with the said Edwin R. Crooker and

Harry L. Crooker; that while her contract bears upon its face the statement that she purchased said contract from Elizabeth Borglum as sales agent, the truth is that she did not buy said contract from said Elizabeth Borglum, but that the said Edwin R. Crooker at the time of said execution of contract explained to affiant that she was on the line of said Elizabeth Borglum and that a woman who was at that time closely associated with the business of Domestic Utilities Manufacturing Company and as plaintiff believes was in the employ of said company and said Crookers, Mrs. E. J. Cayce, by name, brought said Elizabeth Borglum or some person represented [94] to be Elizabeth Borglum, and stated to affiant that it made no difference to affiant who signed said contract as sales agent, and that while it was the company with whom she was dealing, they never appeared in the contracts as making the sale, and that the said Mrs. Borglum would sign the contract as sales agent to affiant; that thereupon the said Edwin R. Crooker explained to affiant that the officers and members of the Domestic Utilities Manufacturing Company had agreed among themselves that none of them would sign said contract as sales agent because they were all engaged in different departments of the business and came in contact with prospective purchasers and that it would be impossible for them to know who in fact procured the sale, and that the agreement as above set forth was made to prevent any contention or disputes among the members of the said corporation as to who was entitled to any given sale.

Affiant further says that she believes said explanations were made for the sole purpose of allaying any suspicion that affiant might have had that there was anything irregular or illegal about their said business, and to take advantage of a legal position which was not at the time understood by affiant, and for the purpose of legally fixing responsibility upon each purchaser of a contract as a party to an illegal transaction. Affiant further says that she never suspected that such was the case or learned that such was a principle of law until about October 1913, when in conversation with Harry L. Crooker the said Harry L. Crooker said to affiant that affiant could not get redress because if she undertook to bring suit against the company or them she would have to bring it in California, and that by the laws of California, affiant was just as guilty of wrongdoing as were defendants herein and that they could show that fact by the form of her contract. [95]

Affiant further says that Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling have at all times since the organization of the Domestic Utilities Manufacturing Company had absolute control, management and domination of the affairs of said corporation, and have been the instigators, framers and molders of all its policies, schemes and plans and have each and all personally participated therein. That the defendants Edwin R. Crooker and Harry L. Crooker have assumed and have acted in the capacity of chief managers and directors of all the affairs of said corporation from its beginning, and that at all times when the said

Edwin R. Crooker and Harry L. Crooker were away from the head office in Los Angeles, defendants Louise E. Crooker, W. P. Ellis and F. W. Sterling were left in charge and direction of the affairs of said corporation. Affiant further says that each and all of said defendants have been personally and equally active in hiding and secluding the property of said corporation to prevent recovery by persons who were wronged by said defendants.

Affiant further says that she is informed and believes and upon such information and belief states the fact to be, that as fast as money was taken in or property was acquired in the name of and through the agency of said corporation as the result of the operations of the individual defendants herein, all said money was divided among the said several individuals above named and that all property acquired was either divided between them and among them or the title thereto obscured and lodged in fictitious names to avoid detection and to prevent the public records from showing ownership of any property whatever in the name of the defendant corporation or in any of the defendants; [96] that as plaintiff is informed and believes the Domestic Utilities Manufacturing Company has no property in its name or upon which the taxes are paid in its name, and has no money or securities that could be reached by the process of this court except such money and property as is kept hidden and secluded and under the direct control and cominon of the individual defendants herein; that affiant has caused careful and diligent search to be made in and among

the public records of Los Angeles, California, and that no property is disclosed by said records that stand in the name of the Domestic Utilities Manufacturing Company, or in the name of any of the defendants herein, except two small pieces of property standing in the name of Harry L. Crooker, one of the assessed valuation of \$120.00 and the other of the assessed valuation of \$1,150.00.

Affiant further says that in November or December 1913, in the City of New York, affiant was importuning the defendant Harry L. Crooker to treat her fairly and to do the fair and right thing by other persons, and affiant stated to said Crooker that unless they did so they would have to answer in suits at law; that thereupon the said Harry L. Crooker drew from his pocket a large roll of money and said to affiant, "You have not any money and we have enough money to buy any judge or jury in the United States, and what are you going to do about it"; that on another occasion, the exact date of which affiant cannot state, affiant was in conversation with the said Edwin R. Crooker, and was demanding redress of the wrongs done her, and the said Edwin R. Crooker said to affiant, "Every man [97] has his price, and you can buy him if you have the money, and we have the money."

Further affiant saith not.

ELIZABETH KNUDSEN,

Subscribed and sworn to before me this 23d day of January, 1915.

ANDREW M. STRONG.

Notary Public in and for Los Angeles County, State of California.

[Endorsed]: Civ. No. 363. In the District Court of the United States, Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company (a Corporation), Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, Defendants. Affidavit to Obtain Order for Arrest of Defendants. Filed Jan. 26, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [98]

Exhibit "A"—Agent's Contract.

THIS INDENTURE, made and entered into by and between the DOMESTIC UTILITIES MANUFACTURING COMPANY, a corporation organized under the laws of the State of California, party of the first part, hereinafter called "Company," and E. Knudsen, residing at Los Angeles, County of Los Angeles, State of California, party of the second part, hereinafter called "Agent."

1. WITNESSETH: That whereas, the afore-said "Company" is now the owner of all the right, title and interest in Letters Patent of the United States bearing number 930,733, granted August 10, 1909, for improvements in clothes pounders, and known on the market as the

VACUUM CLOTHES-WASHER
and Letters Patent Number 907, 102, granted DECEMBER THE 15TH, 1908, FOR IMPROVEMENTS IN OVENS, and known on the market as the

FOUR B OVEN

2. And, whereas, the said "Agent," hereinafter named, is desirous of obtaining the right to sell said Washers and Ovens and flues for said Ovens,

3. Now, therefore, to whom it may concern, be it known that for and in consideration of Five Thousand Dollars (\$5,000.00) this day paid to the "company," the receipt of which is hereby acknowledge, the said "Company" has sold unto the said "Agent" 1667 Vacuum Clothes Washers—Four B Oven Flues.

4. The said "Agent" may, if he so desires, reserve and work, ONE AT A TIME, any number of towns, townships, or counties in which to retail Family Rights for said Washers, Ovens and Flues to others for use, WITH THE PROVISO that the said "Agent" [99] shall comply with the agreements herein mentioned, and shall, on the day that he or his subagents ENTER SAME, send WRITTEN NOTICE to the said "Company" by SPECIAL DELIVERY or TELEGRAM, of his desire and intention to reserve said town, township, or county, he may reserve the same to the exclusion of any other subsequent owner of an Agent's Contract, not then retailing said Family Rights therein. Said "Agent" shall also have the right to sell said Family Rights in any unreserved town, township, or county in the United States and Territories thereof.

5. If two or more Agents enter a town, township, or county on the same day, then, in that event, the notice of reservation FIRST RECEIVED by the said "Company" shall constitute PRIOR claim to said territory.

6. The said "Agent" further agrees not to enter into any territory reserved by another agent TO RETAIL SAID FAMILY RIGHTS for use therein, without the full sanction and co-operation of the agent then working in such territory, and said CONSENT MUST BE IN WRITING.

7. It is expressly understood that in order to hold the reservation to any territory, the said "Agent" must sell in said reserved territory under his Contract at retail, not less than fifty (50) of said Family Rights in the aggregate of said Washers, Ovens or Flues, each and every thirty (30) days after entering said territory.

8. If for any reason the right to any town or county reserved by the said "Agent" is FORFEITED, the same shall revert to the said "Company" and may in like manner be retained by another agent upon consent of the said "Company."

9. It is expressly understood that the said "Agent" shall not have the right to retain a town, township, or county of over one hundred thousand (100,000) population. [100]

10. The said "Agent" shall have the right to appoint FIFTY (50) SUBAGENTS to retail the said Family Rights for said Washer, Oven and Flue (said subagents' duties are fully outlined in blanks furnished for that purpose by the said "Company" and are to be filled out by said subagents and said employer) and said "Agent" SHALL NOT SELL NOR PERMIT HIS SUBAGENTS TO SELL any Family Right for less than Three Dollars and Fifty Cents (\$3.50) for each Washer; Four Dollars

(\$4.00) for each No. 1 Oven; Five Dollars (\$5.00) for each No. 2 Oven and Two Dollars (\$2.00) for each Flue.

11. Each purchaser of a Family Right is entitled to have other Ovens, Washers and Flues from the "Company" or the said "Agent" for his or her own family use at Three Dollars (\$3.00) for No. 1 Oven; Three Dollars and Fifty Cents (\$3.50) for No. 2 Oven; One Dollar and Fifty Cents (\$1.50) per Washer (without handle) and One Dollar and Twenty-five Cents (\$1.25) per Flue, cash with order, and to each purchaser of a Family Right shall be given one Oven or Washer or Flue by the said "Agent" but to no other person or persons. The said "Agent" shall report to the "Company" in writing, once every thirty (30) days, from the date of this instrument the name and address of each purchaser of a Family Right sold by himself or by his subagents.

12. Neither shall the said "Agent" nor any one under him manufacture the said washer or Flue, nor cause the same to be done, and the "company hereby agrees to hereafter furnish the said "Agent" with said Washers, Ovens and Flues at One Dollar (\$1.00) per washer (without handle), One Dollar (\$1.00) per Flue; Two Dollars and Twenty-five cents (\$2.25) for each No. 1 Oven; Three Dollars (\$3.00) for each No. 2 Oven, F. O. B. cars Los Angeles, Cal., Lauderdale, Miss., or the "Company's" nearest shipping point; the same to be determined by the "Company," to be paid for when ordered. [101]

13. The said "Agent" shall have the right to sell

unto others wholesale lots of said Washers and Flues at the prices hereinafter named, and upon the FOLLOWING CONDITIONS:

14. Upon the first sale made by the said "Agent" of a wholesale lot of Washers or Flues of the same size as the one purchased herewith, he may deliver unto the purchaser the Washers or Flues received herewith, and shall issue to the said purchaser a contract identically the same as this one, and he shall be entitled to retain the entire amount received from such sale.

15. The said "Agent" may make as many sales at wholesale as he may successfully solicit, upon such parties signing a contract in every way IDENTICAL WITH THIS CONTRACT, which has been printed upon forms for and by the said "Company" and duly approved by its officers at the following prices:

Fifty (50) Vacuum Clothes-Washers or	
seven-five (75) Four B Oven Flues for.	\$ 150.00
One hundred sixty-seven (167) Vacuum	
Clothes-Washers or two hundred fifty	
(250) Four B Oven Flues for.....	500.00
Three hundred thirty-four (334) Vacuum	
Clothes-Washers or Five Hundred	
(500) Four B Oven Flues for.....	1000.00
Eight Hundred thirty-four (834) Vacuum	
Clothes-Washers or twelve hundred	
fifty (1250) Four B Oven Flues for..	2500.00
Sixteen hundred sixty-seven (1667) Vacuum	
Clothes-Washers or two thousand five	
hundred (2500) Four B Oven Flues...	5000.00

16. The said "Company" hereby agrees with the said "Agent" that for each sale of Washers and Flues made by the said "Agent" of any of the lots of Washers and Flues above specified and at the prices stated; it will allow him a commission upon such sales as shown in tables following: [102]

Size of different sales of Washers made

by the said "Agent".....	\$150	\$500	\$1,000	\$2,500	\$5,000
Commissions due the said "Agent"....	\$100	\$333	\$ 666	\$1,666	\$3,333

Size of different sales of Flues made

by the said "Agent".....	\$150	\$500	\$1,000	\$2,500	\$5,000
Commissions due the said "Agent"....	\$ 75	\$250	\$ 500	\$1,250	\$2,500

16A. Besides the commission indicated in above table the said "Agent" shall receive the said "Company's" part on all sales at wholesale and increase of said sales resulting from the sales of the aforesaid \$150.00, \$500.00, and \$1000.00, and \$2500.00 sales at wholesale (LESS THE MONEY DUE THE "COMPANY" FOR WASHERS AND FLUES); that is to say, IN THE LINE OF SUCCESSION TO SUCH SALES and in consideration of his having purchased a \$5000.00 wholesale lot of the aforesaid articles, provided, however, that no line of succession shall accrue to the holder of this contract unless the initial or first sale is made to the purchaser by him, the said "Agent," through his own or the solicitation of his subagent or agents in his line of succession; and solicitation of the purchaser to have originated through the said "Agent," his subagents or agents of his line of succession, and no agent shall, through any act or sale, divert any agent in the line of succession of another agent to his own line of succession,

through the sale of any larger wholesale lots of said articles.

17. The "Agent" shall also have the right to sell for the "Company," said Washers, Ovens and Flues at wholesale anywhere in the United States and Territories thereof (except in territory reserved by another agent). Prices and commissions on same are shown in the following tables: [103]

WASHERS.			FLUES.		
Quantity.	Prices.	Agent's Com- mission.	Quantity.	Prices.	Agent's Com- mission.
1	\$3.00	\$2.00	1	\$1.75	0.75
6	2.50 each	1.50 each	6	1.50 each	.50 each
12	2.00 each	1.00 each	12	1.35 each	.35 each
24	1.75 each	.75 each	24	1.25 each	.35 each
48	1.50 each	.50 each	48	1.15 each	.25 each

NO. 1 OVENS.			NO. 2 OVENS.		
Quantity.	Prices.	Agent's Com- mission.	Quantity.	Prices.	Agent's Com- mission.
1	\$3.75	\$1.50	1	\$4.50	1.50
6	3.25 each	1.00 each	6	4.00 each	1.00 each
12	3.00 each	.75 each	12	3.75 each	.75 each
24	2.75 each	.50 each	24	3.50 each	.50 each
48	2.50 each	.35 each	48	3.25 each	.35 each

18. In making sales shown in the above table, the "Agent" shall use printed form called "Retail Contract," a copy of which is shown on back of this "Agent's Contract."

19. The "Agent" may also sell (in unreserved territory) any number of said Washers, Ovens and Flues above 48 for retail purposes, the prices and commissions to be determined by the "Company."

20. The said "Agent" shall make a FULL AND COMPLETE REPORT TO THE "COMPANY" by registered letter, of each and every sale of said articles made under any Wholesale or Retail Con-

tract, at once after completion, of same, giving name of purchaser, his address and occupation, and said report shall state in full what was taken in payment for same, and the portion due the "Company" (which is the full amount thereof less the "Agent's" commission as stated), shall accompany said report and must be paid in cash. [104]

A failure on the part of the "Agent" to send to the "Company" the amount due the "Company" for each sale so made by him will be held by the "Company" to be breach of trust.

21. The "Agent" shall sell no wholesale lots of said articles without the full price therefor being paid, nor shall the said "Agent" sell the same in his own name unto any person or persons previously solicited by any other agent or his subagent or his subagents unless he shall compensate such agent (the term "Such Agent" refers to the agent who first solicited the purchaser) with a portion of the commission that would have been due "such agent" had "such agent" closed such sale, which shall, in the absence of an agreement, be fifty per cent (50%) PROVIDED "Such Agent" be a \$5000.00 or \$2500.00 contract owner, otherwise the Agent who closes said sale and the Agent who first solicited the purchaser, shall divide equally between them the profit that would have accrued to the owner of the smaller contract of the two, had he closed said sale under his contract, the "COMPANY" to receive the remainder.

22. If any other arrangement he entered into between the owner of this contract and Such Agent

(the term "Such Agent" refers to the agent who first solicited the purchaser) it shall provide for the payment to the "Company" of the amount due the "Company" as above stated.

23. All monies due the "Company" must be sent by draft, post office or express money order, and will positively not be accepted if sent otherwise.

24. Showing one or all of the above-named articles in operation and making an appointment to explain the business shall constitute a solicitation. It is clearly understood that a solicitation shall be operative until one sale is closed, but no longer. [105]

25. The said "Agent" shall not directly or indirectly accept any other agent's or subagent's Wholesale Prospects or transfer his, or his subagent's Wholesale Prospects, nor conspire against the "Company" in any manner whatever, and shall not employ as a subagent, directly or indirectly, any owner of an agency, thus depriving the "Company" of what it would have received had the sale been closed by the agent soliciting the said prospect, and had said conspiracy not been entered into.

26. The "Agent" agrees to submit on demand of the Company, on suitable blanks furnished by the Company, a full and complete statement sworn to by him and by the purchaser of any wholesale lot of washers or flues, of the true amount of money paid and received and all transfers or representatives of value delivered or received for such sales of such articles and rights granted under any contract purchased by him, or transferred or sold by him.

27. The "Agent" further agrees that at all times

he will conduct the business of selling the said Washers, Ovens and Flues, and Family Rights for same, in a business like manner and use his utmost endeavor to introduce and sell the same to actual users thereof, and he hereby agrees that he will relinquish the right granted him to any territory he may at that time be in possession of (upon demand made upon him by the "Company") if he fails to sell less than fifty (50) Family Rights in the aggregate for said Washers, Ovens and Flues, each and every thirty (30) days as above mentioned.

28. It is clearly understood that the "Company" SHALL NOT BE RESPONSIBLE IN ANY MANNER WHATEVER FOR COLLECTION OF ANY OF THE AFORESAID COMMISSIONS DUE SAID "AGENT."

29. In making sale of this or any of the within named Wholesale lots of Washers, Ovens and Flues, four contract forms must be [106] filled out, one (1) to be retained by the purchaser, three (3) to be sent to the "Company," and on approval by the "Company" its seal will be placed on the same, one of which will be sent to the purchaser (in exchange for the one held by him), one to the salesman, and one to be placed on file in the offices of the "Company."

30. The said "Agent" shall have the right (if he so desires) to have said Ovens made for Retail and Wholesale purposes with the proviso; that the Flues used in said Ovens shall be purchased from the "Company" at One Dollar (\$1.00) each, F. O. B. cars, Los Angeles, Cal., Lauderdale, Miss., or the

“Company’s” nearest shipping point; the same to be determined by the “Company,” cash with order. said Ovens must be of the same construction and material as those furnished now and hereafter by the “Company,” and the Agent agrees to report to the “Company” all of such ovens made by or for him.

31. The said “Agent” agrees to POST, INFORM AND EDUCATE ALL PERSONS TO WHOM HE MAY SELL FAMILY RIGHTS AND ALL PERSONS HE MAY APPOINT AS SUB-AGENTS OR PERSONS TO WHOM HE MAY SELL SAID ARTICLES AT WHOLESALE so that they may fully understand and know how to operate the said Washer, Oven and Flue to the best possible advantage that their labors may be profitable.

32. Neither the “Company” nor any member of it shall be responsible for said instructions, and the said “Agent” hereby agrees to remain under his instructor or educator until he is posted, informed and educated as above stated.

33. The “Company” shall not be responsible in any manner for any agreements that said “Agent” or his subagents may make which do not exist in this document; and the said “Agent” shall have all the profits derived from the sales of said Family Rights sold by him or his subagents. [107]

34. The said “Agent” shall not give his subagents more than *Twenty-five* (\$25) on the sale of each one hundred and fifty dollar (\$150) wholesale lot, seventy-five dollars (\$75) on each five hundred dollar (\$500) wholesale lot, one hundred dollars

(\$100) on each one thousand dollar (\$1000) wholesale lot, two hundred dollars (\$200) on each twenty-five hundred dollar (\$2500) wholesale lot and three hundred and seventy-five dollars (\$375) on each five thousand dollars (\$5000) wholesale lot of the goods, hereinbefore mentioned made by said subagent.

35. This contract is not transferable, except in case of death of said "Agent" (unless by the consent of the "Company") and said transfer must bear the seal of the "Company."

36. The "Company" agrees to furnish the said "Agent" with blank forms at his expense in "Agent's Outfit" of printed matter (said outfit containing other printed matter and certified copy of each of the above-mentioned Letters Patent; furnished by the "Company" at Five Dollars (\$5.00) per outfit, cash with order) for use by him in entering into contracts and sales to others in accordance with these forms; and said "Agent" is hereby authorized and empowered to execute such contracts provided they are in accordance with this and other contract forms printed by the "Company" and the said "Agent" has not forfeited the right herein conveyed; the said "Agent" is not to use any form of contract not printed and furnished by the "Company."

37. It is agreed by and between the parties hereto that all agreements or contracts of sales made or entered into by the said "Agent" shall be sent to the "Company" immediately upon being entered into, for the ratification and approval of the said "Company" and the "Company" agrees to act upon all

sales [108] made by the "Agent" upon presentation of the same at its offices at Los Angeles, California, within sixty (60) days after execution, and it will record and register such agreements in proper books kept for that purpose. Any contract or agreement made by the "Agent" and not sent to the "Company" for approval and ratification shall become null and void after the expiration of five (5) days from the date thereof.

38. It is understood and agreed, and the "Agent" hereby specifically consents and agrees, that in the event of said "Agent" violating any of the terms of this agreement that he shall forfeit all right to transact business under and by virtue of the rights hereunder conveyed and the "Company" may refuse to recognize said "Agent" as a lawful representative without notice.

Witness our hand and seal this 7th day of July, 1911.

DOMESTIC UTILITIES MANUFACTURING COMPANY.

By W. P. ELLIS,
Secty.

Witness:

Countersigned by

Sales Agent sign here.

ELIZABETH BORGLUM. (Seal) (Seal)

Purchaser sign here. (Seal) (of)

(Com-)

(Party of the Second Part) (pany)

Signed, sealed and delivered for the purpose herein mentioned.

I have read the above instrument and understand its contents perfectly. It embraces the entire contract and there are no verbal agreements not contained therein.

Purchaser sign here.

ELIZABETH KNUDSEN. (Seal)

Witnesses:

Address all Communications Unless Otherwise Notified to DOMESTIC UTILITIES MANUFACTURING COMPANY, LOS ANGELES, CALIFORNIA.. [109]

(COPY)

RETAIL CONTRACT.

This indenture, made and entered into by and between the DOMESTIC UTILITIES MANUFACTURING COMPANY, a corporation, organized under the laws of the State of California, party of the first part, hereinafter called "Company," and _____, residing at _____, County of _____, State of _____, party of the second part, hereinafter called "Agent"

WITNESSETH: That, whereas, the "Company" is now the owner of all the right, title and interest in Letters Patent of the United States bearing number 930,733, granted August 10, 1909, for improvements in clothes pounders, and known on the market as the

VACUUM CLOTHES-WASHER

and Letters Patent Number 907,102, granted Decem-

ber the 15th, 1908, for improvements in Ovens, and known on the market as the

FOUR B OVEN

And, whereas, the "Agent" hereinafter named, is desirous of obtaining the right to sell said Washers and Ovens and Oven Flues for said Ovens,

NOW, THEREFORE, to whom it may concern, be it known that for and in consideration of ——— Dollars (\$——) this day paid to the "Company" the receipt of which is hereby acknowledged, the "Company" has sold unto the said "Agent" ——— ——— VACUUM CLOTHES-WASHERS ——— No. 1 Four B. Ovens, ——— No. 2. Four B Ovens, ——— Four B Oven Flues, and does hereby grant unto the said "Agent" the right and privilege to sell Family Rights for the said Washers, Ovens and Flues to others for use.

The said "Agent" shall not sell the said Family Rights for the No. 1 and No. 2 Ovens for less than \$4.00 and \$5.00 each, [110] respectively; and the said Family Rights for the Washers and the Oven Flues at \$3.50 and \$2.00 respectively; and to each purchaser of a Family Right shall be given one Oven or Washer or Flue by said "Agent."

The "Company" agrees to furnish the said "Agent" all the No. 1 and No. 2 Ovens, Washers and Flues he may hereafter Desire, to be paid for when ordered, at the prices stated in the following table, F. O. B. cars, Los Angeles, Cal., Lauderdale, Miss., or the "Company's" nearest shipping point; the same to be determined by the "Company."

No. 1 OVENS RETAIL-

ING AT \$4.00 EACH

1 at	\$3.75
6 at	3.25 each
12 at	3.00 each
24 at	2.75 each
48 at	2.50 each

WASHERS.

1 at	\$3.00
6 at	2.50 each
12 at	2.00 each
24 at	1.75 each
48 at	1.50 each

No. 2 OVENS, RETAIL-

ING AT \$5.00 EACH

1 at	\$4.50
6 at	4.00 each
12 at	3.75 each
24 at	3.50 each
48 at	3.25 each

FLUES.

1 at	\$1.75
6 at	1.50 each
12 at	1.35 each
24 at	1.25 each
48 at	1.15 each

It is agreed by and between the parties hereto that this agreement or Contract of sale shall be made in triplicate; two of the same shall be sent to the "Company" at Los Angeles, California, immediately upon being entered into for the ratification and approval of the said "Company," one to be placed on file in the offices of the "Company," the other to be returned to the purchaser, the third to be retained by the salesman. [111]

This Contract or agreement shall become null and void if not sent to the "Company" for their approval and ratification within five (5) days from date hereof.

Witness our hands and seals this — day of
_____, 1910.

DOMESTIC UTILITIES MANUFACTUR-
ING COMPANY.

By _____,
(Seal of Company.)

Witnesses:

_____.

Purchaser sign here. _____.

(Party of the Second Part.)

(“Endorsement.”)

2

\$5000 AGENT'S CONTRACT
DOMESTIC UTILITIES MANUFACTURING
COMPANY

With

E. Knudsen

Los Angeles

(Postoffice Address Here)

“ “ Cal.

(County and State Here)

Real Estate.

(Occupation)

(Name of Salesman Here)

Sierra Madre

(Postoffice Address Here)

Los Angeles, Cal.

(County and State Here)

Date July 7, 1911.

Copyright. Domestic Utilities
Manufacturing Company. 1910. [112]

Exhibit "B" [Agents' Notification].

Los Angeles, Cal., July 9, 1913

**AGENTS' NOTIFICATION
CANCELLATION OF MISS KNUDSEN'S
MANUFACTURING RIGHT.**

Dear Sir:

This letter is to notify you that Miss Elizabeth Knudsen's right to manufacture washers for the Domestic Utilities Manufacturing Company has been formally canceled. Copy of our letter to Miss Knudsen as follows:

"Miss Elizabeth Knudsen,
39 West 34th Street,
New York.

Dear Madam:

On February 15th we notified you that your right to manufacture Vacuum Clothes-Washers and sell same to the agents of this company on a royalty basis was canceled. Since the above date you have continued to manufacture, sell and deliver these washers.

We are writing now only to say that we wish this arrangement discontinued at once and desire that you regard this letter as a formal notice to this effect, and also to say that we have instructed our Mr. H. L. Crooker in New York, to call upon you and arrange to pay you the cost of manufacture for all washers which you now have on hand. We desire to make a fair and equable settlement with you in this matter, not in a spirit of appearing to be dissatisfied with the work which you have done, but merely because the exigencies of the business require it.

Kindly send us on receipt of this letter, a full and

complete statement of all of the washers that you have sold and manufactured to date and accompany same with remittance for the [113] royalty due us, in accordance with the letter which you sent us in which you stated that a statement of this kind would be forthcoming from you on the first of May."

This manufacturing right was given to Miss Knudsen in the early stages of the business in the East, before we began to manufacture machines in the East.

We want you to thoroughly understand that this cancellation of Miss Knudsen's manufacturing right is not for the purpose of throwing any discredit on Miss Knudsen, but is made necessary in order to expedite the filling of orders and the ratification of contracts.

On and after the receipt of this letter all orders for washers, together with the Company part of the money, must be sent direct to the company, according to contract, unless otherwise notified.

Yours truly,

DOMESTIC UTILITIES MFG. CO. [114]

That after the filing of said complaint and said affidavits, and on said 26th day of January, 1915, the Judge of this court made an order for the arrest of defendants Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling in said action; said order being in words and figures as follows, to wit:

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, EDWIN R. CROOKER,
HARRY L. CROOKER, LOUISE E.
CROOKER, W. P. ELLIS and F. W. STER-
LING,

Defendants.

Order of Arrest.

The President of the United States of America, to
the Marshal of the Southern District of Cali-
fornia, Greeting:

WHEREAS, The above-named plaintiff having
commenced an action in the District Court of the
United States for the Southern District of Cali-
fornia, Southern Division, against the above-named
defendants, and it duly appearing to me from the
complaint on file and from affidavits submitted to me
and filed on the part of the said plaintiff, that a suffi-
cient cause of action exists, and that the case is one of
those mentioned in [115] Section Four Hundred
and Seventy-nine of the Code of Civil Procedure of
the State of California, in this, to wit:

That the defendants have been guilty of fraud in
contracting the debt for which the said action is
brought, and that the said defendants are about to
depart from the State of California and from the
United States with intent to defraud their creditors

and the creditors of Domestic Utilities Manufacturing Company, a corporation, and that the defendants have removed and disposed of and have concealed and are concealing their property with intent to defraud their creditors, and the necessary undertaking having been given by the plaintiff herein, I, the undersigned, one of the judges of the said District Court of the United States for the Southern District of California, Southern Division, by virtue of the authority in me vested by law, DO ORDER AND REQUIRE YOU, the said Marshal of the Southern District of California, forthwith to arrest the said defendants Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker, W. P. Ellis and R. W. Sterling, if they be found within your said district, and hold them to bail in said action in the sum of \$10,000.00, Ten Thousand Dollars each as to E. R. Crooker, H. L. Crooker and W. P. Ellis, and \$5,000.00 each as to L. E. Crooker and F. W. Sterling, and that you return this order, with your proceedings thereon, to the Clerk of the said District Court, on the 25th day of February, 1915.

Done and dated this 26 day of January, A. D. 1915.

BENJAMIN F. BLEDSOE,

Judge.

[Endorsed]: No. 363-Civil. U. S. District Court, Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Co. et al., Defendants. Order of Arrest. Filed Feb. 11, 1915. Wm. M. Van Dyke, *Clerk*. By Chas. N. Williams, Deputy. [116]

Marshal's Return.

In obedience to the within Order of Arrest, I have the body of the within-named defendant Edwin R. Crooker this 29th day of Jany., 1915.

C. T. WALTON,
U. S. Marshal,
By J. S. Durlin,
Deputy.

MARSHAL'S RETURN.

In obedience to the within Order of Arrest, I have the bodies of Mrs. L. E. Crooker and F. W. Sterling, the within-named defendants, this 4th and 8th days of Feb., 1915.

C. T. WALTON,
U. S. Marshal,
By F. H. Jasper,
Deputy.

MARSHAL'S RETURN.

In obedience to the within Order of Arrest, I have the body of W. P. Ellis, the within-named defendant, this 30th day of January, 1915.

C. T. WALTON,
U. S. Marshal,

That thereafter, and after the issuance of said Order of Arrest, and on the 27th day of January, 1915, a summons was issued in said action, in words and figures as follows:

[**Summons.**]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), et al.,
Defendant.

Action brought in the said District Court, and the
Complaint filed in the office of the clerk of said
District Court, in the City of Los Angeles,
County of Los Angeles, State of California.
[117]

The President of the United States of America,
Greeting: To the Domestic Utilities Manufactur-
ing Company (a Corporation), Edwin R.
Crooker, Harry L. Crooker, Louise E. Crooker,
W. P. Ellis and F. W. Sterling.

You are hereby required to appear in an action
brought against you by the above-named plaintiff in
the District Court of the United States, in and for the
Southern District of California, Southern Division,
and to file your plea, answer or demurrer, to the
complaint filed therein (a certified copy of which ac-
companies this summons), in the office of the clerk
of said court, in the City of Los Angeles, County of
Los Angeles, within twenty days after the service on

you of this summons, or judgment by default will be taken against you.

And you are hereby notified that unless you appear and plead, answer, or demur, as herein required, the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon a contract or will apply to the Court for any further relief demanded in the complaint.

WITNESS, the Honorable BENJAMIN F. BLEDSOE, Judge of the District Court of the United States, in and for the Southern District of California, this 27th day of January, in the year of our Lord one thousand nine hundred and fifteen, and of our Independence the one hundred and thirty-ninth.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

[Seal of U. S. District Court.]

A true copy. Attest, etc.:

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk. [118]

[Endorsed]: No. 363—Civil. U. S. District Court, Southern District of California, Southern Division. Elizabeth Knudsen vs. Domestic Utilities Manufacturing Company et al. Summons. Robert L. Hubbard, Plaintiff's Attorney. Filed Feb. 19, 1915. Wm. M. Van Dyke, *Clerk*. By R. S. Zimmerman, Deputy.

United States Marshal's Office,
Southern District of California.

I hereby certify that I received the within writ on the 27th day of Feb., 1915, and personally served the same on the 30th day of Feb., 1915, by delivering to and leaving with Domestic Utilities Co., by leaving copy with W. P. Ellis, Secy. of said corporation, W. P. Ellis, Edwin R. Crooker, Louise E. Crooker, and F. W. Sterling, said defendants named therein, at the County of Los Angeles, in said district, a certified copy thereof, together with a copy of the complaint, certified to by Wm. M. Van Dyke, attached thereto.

C. T. WALTON,
U. S. Marshal.

Los Angeles, Feb. 10, 1915.

That by virtue of said order of arrest the defendant Edwin R. Crooker was arrested by the United States Marshal for the Southern District of California, on the 29th day of January, 1915, and confined until the 1st day of February, 1915; that on said 1st day of February, 1915, the said defendant Edwin R. Crooker gave bail in the sum of Ten Thousand Dollars (\$10,000), and that said defendant Edwin R. Crooker is now at liberty under said bail.

That by virtue of said order of arrest defendant W. P. Ellis was arrested by the United States Marshal for the Southern District of California, on the 30th day of January, 1915, and confined until the 1st day of February, 1915, the said defendant W. P. Ellis gave [119] bail in the sum of Ten Thousand Dollars (\$10,000), and that said defendant W. P. Ellis is now at liberty under said bail.

That by virtue of said order of arrest the defendant Louise E. Crooker was arrested by the United States Marshal for the Southern District of California on the 4th day of February, 1915, and on said 4th day of February, 1915, gave bail in the sum of Five Thousand Dollars (\$5,000), and is now at liberty under said bail.

That by virtue of said order of arrest the defendant F. W. Sterling was arrested by the United States Marshal for the Southern District of California on the 8th day of February, 1915, and on the said 8th day of February, 1915, gave bail in the sum of Five Thousand Dollars (\$5,000), and is now at liberty under said bail.

That the bail bonds given by said defendants provide in each case that the said defendant will at all times render himself amenable to the process of said Court during the pendency of said action and to such as may be issued to enforce the judgment therein, and if the said defendant fails to so render himself amenable to the said process or processes of the Court, or any of them, that the sureties on said bail bond will pay to the plaintiff any judgment which may be recovered against the said defendant, not exceeding Ten Thousand Dollars (\$10,000) in the case of each of the defendants Edwin R. Crooker and W. P. Ellis, and Five Thousand Dollars (\$5,000) in the case of each of the defendants F. W. Sterling and Louise E. Crooker. That no service of the process in this action, or of said order of arrest, has been had upon the defendant Harry L. Crooker.

That on the 12th day of February, -1915, the de-

fendants Domestic Utilities Manufacturing Company, a corporation, Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, [120] requested and obtained from the attorney for the plaintiff in this action a stipulation allowing said defendants to and including the 28th day of February, 1915, within which to plead in said action, and that an order of Court was made, based upon said stipulation, granting said defendants to and including said 28th day of February, 1915, within which to plead.

That thereafter and on the 23d day of February, 1915, plaintiff, through her attorney, without notice to defendants or their attorneys, made an *ex parte* application to the Court for leave to file an amendment to her complaint, and filed a motion for leave to amend said complaint in words and figures as follows:

In the District Court of the United States, Southern District of California, Southern Division.

CIV. No. 363.

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), EDWIN R.
CROOKER, HARRY L. CROOKER,
LOUISE E. CROOKER, W. J. ELLIS and
F. W. STERLING,

Defendants.

Motion for Leave to Amend Complaint.

Comes now Elizabeth Knudsen, the plaintiff herein, and prays leave of the Court to amend her complaint herein in the following manner:

By making the first paragraph of her said complaint read as follows: [121]

First. That she is a single woman, and is a citizen of the State of Alabama, one of the States of the United States of America, instead of

“First. That she is a single woman, a resident and citizen of the City of Washington, in the District of Columbia,” as her said complaint now reads at lines sixteen and seventeen of page one of her said complaint, and for grounds of this motion says:

1. That at the time of the making and filing of her said complaint herein, she was and still is, a citizen of the State of Alabama and was not a citizen of the City of Washington or of the District of Columbia; that by an oversight she failed to observe the fact that her complaint as prepared recited the fact that she was a citizen of the City of Washington, in the District of Columbia; that her said complaint as it now stands does not correctly state the fact of her citizenship at the time said complaint was made and filed; that her attorney who prepared said complaint incorrectly stated therein that she was a resident and citizen of the City of Washington, in the District of Columbia, and that her attention was not called directly to the allegation of citizenship as alleged in her said complaint, and that she did not realize or know that the allegation of

citizenship was a necessary or a material allegation, and failed to give to or state to her said attorney who prepared said complaint the facts in that regard; that for sometime prior to the preparation of said complaint by her said attorney she was temporarily sojourning in said City of Washington in the District of Columbia in connection with the matters sued upon herein, and was in correspondence with her said attorney who prepared said complaint, and that all said correspondence from the plaintiff to her said attorney was dated at and written from the City of Washington, [122] in the District of Columbia; that she did not learn of said error in her said complaint until on the 20th day of February, 1915, when she was re-examining the said complaint and observed the said error and that she then immediately called the attention of her said attorney who prepared said complaint to said error as to her citizenship, and requested that a correction of the same be made. She further says that her said complaint was prepared by Robert L. Hubbard, as her attorney, and that she and her said attorney were engaged in the preparation of said complaint under stress of anxiety and haste.

2. That said allegation of citizenship was not stated as alleged with any intention on the part of plaintiff to misrepresent the facts, but was by her inadvertently overlooked and not noticed to be incorrectly stated.

Plaintiff further says that none of the defendants named in this action *have* filed in the cause any plea or answer to her said complaint and that the time

has not expired when they or any of them are required to plead or answer to her said complaint.

Plaintiff further says that she files herewith her own affidavit and the affidavit of Robert L. Hubbard, her said attorney, in support of her said motion for leave to amend and prays that said affidavits be considered in connection herewith.

Plaintiff further prays that she be allowed and granted leave to file and serve upon the defendants or their attorneys an amendment of said complaint embracing and clearly pointing out the portion of said complaint allowed to be amended, together with a copy of the order of the court touching and permitting said amendment without rewriting and reserving the whole of said complaint as amended.

ROBERT L. HUBBARD,

Attorney for Plaintiff. [123]

ELIZABETH KNUDSEN,

The Plaintiff.

[Endorsed]: No. 363 Civil. U. S. District Court, Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company, a Corporation, et al., defendants. Motion for Leave to Amend Complaint. Filed Feb. 23, 1915. Wm. M. Van Dyke, Clerk. By F. F. Green, Deputy. [124]

That on said 23d day of February, 1915, said plaintiff filed in said action an affidavit in support of her motion to amend her complaint; said affidavit being in words and figures as follows:

*In the District Court of the United States, Southern
District of California, Southern Division.*

CIV. No. 363.

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), EDWIN R.
CROOKER, HARRY L. CROOKER,
LOUISE E. CROOKER, W. P. ELLIS and
F. W. STERLING,

Defendants.

**Affidavit of Elizabeth Knudsen in Support of Motion
to Amend Her Complaint.**

State of California,
County of Los Angeles,—ss.

Elizabeth Knudsen, being duly sworn, says: I am the plaintiff in the above-entitled action. I am, and at the time of preparing and filing the complaint herein I was, a citizen of the State of Alabama. Robert L. Hubbard of Los Angeles, California, is my attorney of record in the cause, and prepared the complaint herein. At the time of the preparation of said complaint I undertook to state *of* my said attorney all facts and every fact concerning the matters and things set forth in the complaint herein, and so far as possible and in all respects concerning which I was advised that it was necessary or proper I did state the facts fully and truthfully. That said complaint [125] was prepared hur-

riedly and that in the preparation thereof many documents and papers had to be examined and read, and many facts had to be stated from memory, and said work was a great strain upon me.

That at the time of preparing and filing the complaint in this cause I was not a resident or citizen of the City of Washington, in the District of Columbia, but that for some time prior to the preparation and filing of said complaint, I had been temporarily sojourning in said City of Washington and was there engaged in matters connected with the preparation of this cause; that while in said City of Washington, I wrote a number of letters to my said attorney in Los Angeles relative to the matters and things set forth in my said complaint herein; that thereafter I came from the City of Mobile, in the State of Alabama, to the City of Los Angeles, to institute this action; that my said attorney and myself were strangers save for the correspondence that had passed between us; that I at no time knew it to be necessary or material that I should state of what State I was a citizen and that at no time did I state said fact to my said attorney; that had I known that my citizenship should have been stated I would have stated it to my said attorney correctly. That I did not observe or notice that any facts were set forth in my said complaint herein concerning my said citizenship or that it was incorrectly stated in said complaint at the time said complaint was prepared and filed nor until the 20th day of February, 1915, when, upon re-examining said complaint and in discussing my business affairs in the State of Alabama

with my said attorney I observed that it was incorrectly set forth in my said complaint that I was a resident and citizen of the said City of Washington, in the District of Columbia; that I immediately called said error to the attention of my said [126] attorney and requested that the same be corrected. That it is my intention to return to the State of Alabama in a short time to take personal charge of my business and property interests there.

Affiant further says that she did not misstate her said citizenship to her said attorney, nor did she state it to him at all, nor was said citizenship stated in said complaint incorrectly for the purpose of misleading or deceiving or from or for any improper or illegal motives or purposes, but was so stated by inadvertence and oversight, and without any intention on the part of plaintiff to misrepresent the fact.

Affiant further says that none of the defendants in this action have filed any plea or answer to her said complaint herein.

ELIZABETH KNUDSEN.

Subscribed and sworn to before me, at my office in Los Angeles, California, this 23d day of February, 1915.

[Seal]

ANDREW M. STRONG,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 363—Civil. U. S. District Court, Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company, a Corporation, et al., Defendants. Affidavit of Elizabeth Knudsen in Sup-

port of Motion to Amend Her Complaint. Filed Feb. 23, 1915. Wm. M. Van Dyke, Clerk. By F. F. Green, Deputy. [127]

That on said 23d day of February, 1915, the said plaintiff filed an affidavit of Robert L. Hubbard in support of Motion for leave to amend complaint, in words and figures as follows:

*In the District Court of the United States, Southern
District of California, Southern Division.*

CIV. No. 363.

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), EDWIN R.
CROOKER, HARRY L. CROOKER,
LOUISE E. CROOKER, W. P. ELLIS and
F. W. STERLING,

Defendants.

**Affidavit of Robert L. Hubbard in Support of Motion
for Leave to Amend Complaint.**

State of California,
County of Los Angeles,—ss.

Robert L. Hubbard, being duly sworn, says: I am the attorney of record for the plaintiff in the above-entitled cause. I prepared the complaint herein and caused the same to be filed in this cause. That said complaint was prepared very hastily and under great stress and pressure of business. That for some time previous to the preparation of said complaint, affiant

was in correspondence with the plaintiff herein and received many letters from the plaintiff herein, who at that time was in the City of Washington, D. C.; that affiant also had much correspondence with M. Walton Hendry, an attorney-at-law, with offices in said City of Washington, D. C.; that all said correspondence was in connection with and related to the [128] matters in suit herein; that I became thoroughly impressed with the belief that the plaintiff herein was a resident and citizen of said City of Washington, D. C., and at all times associated the plaintiff herein with said city. That a short time before the preparation of the complaint in this cause, affiant received a telegram from the plaintiff herein from the City of Mobile, in the State of Alabama, and that said telegram referred to the plaintiff's coming to Los Angeles, California, where affiant has his office, and to the matters and things set forth in the complaint in this cause; that plaintiff came to the office of affiant and the preparation of the complaint herein was undertaken and begun by affiant; that in the preparation of said complaint, affiant was compelled to and did examine many documents of great length and intricacy and in gathering the facts set forth in said complaint performed much labor, and many details had to be and were examined with great care; that through oversight and inadvertence affiant failed to inquire of plaintiff concerning her citizenship and laboring under the impression that plaintiff was a citizen of the City of Washington, in the District of Columbia, dictated said complaint to his stenographer as the same

appears on file herein and incorrectly stated in said complaint that the plaintiff was a resident and citizen of the City of Washington, in the District of Columbia, and did not call the attention of plaintiff directly to said allegation; that through inadvertence and oversight on part of both affiant and plaintiff said error was not discovered until plaintiff on the 20th day of February, 1915, called at the office of affiant and discussed with him her business and property interest in the State of Alabama, and stated to affiant that she wanted to return to Alabama as soon as she could to take personal charge of her business in that state, and when and at which time, [129] plaintiff stated to affiant that she wished to examine her said complaint herein and that when she did re-examine her said complaint she called affiant's attention to the fact that her citizenship was incorrectly alleged in said complaint, and pointed out to affiant that she was not a citizen of the City of Washington, in the District of Columbia, and requested affiant to correct said allegation.

Affiant further says that none of the defendants have filed any plea or answer to the complaint herein, and that the time within which said defendants are required to plead to or answer the said complaint has not expired and will not expire until the 28th day of February, 1915.

Affiant further says that, as he firmly believes, the ends of justice will be conserved by the granting of the motion for leave to amend the complaint herein and by said complaint being amended so as to correctly and truthfully state the citizenship of

the plaintiff in this case.

ROBERT L. HUBBARD.

Subscribed and sworn to before, at my office in the City of Los Angeles, California, this 23d day of February, 1915.

[Seal] ANDREW M. STRONG,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 363—Civil. U. S. District Court, Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company, a Corporation, et al., Defendants. Affidavit of Robert L. Hubbard in Support of Motion for Leave to Amend Complaint. Filed Feb. 23, 1915. Wm. M. Van Dyke, Clerk. By F. F. Green, Deputy. [130]

That the said Court on said *Exparty* Motion for Leave to amend complaint, and on said 23d day of February, 1915, made a Minute Order in words and figures, as follows, to wit:

[Order Granting Leave to Amend Complaint, etc.]

No. 363—CIVIL, S. D.

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), et al.,
Defendants.

Robert L. Hubbard, Esq., of counsel for plaintiff, having moved the Court that plaintiff be granted

leave to amend her complaint in certain respects, and having presented a proposed amendment to plaintiff's complaint, it is now by the Court ordered that said motion be, and the same hereby is granted, and that plaintiff, accordingly, be, and she hereby is granted leave to file said proposed amendment to her complaint, whereupon said amendment to plaintiff's complaint is filed in open court.

That thereafter and on said 23d day of February, 1915, plaintiff served upon attorneys for defendants Domestic Utilities Manufacturing Company, a Corporation, Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, said amendment to her complaint, in words and figures as follows: [131]

In the District Court of the United States, Southern District of California, Southern Division.

CIV. No. 363.

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), EDWIN R.
CROOKER, HARRY L. CROOKER,
LOUISE E. CROOKER, W. P. ELLIS and
F. W. STERLING,

Defendants.

Amendment to Complaint.

Comes now Elizabeth Knudsen, plaintiff above named, and by leave of Court first obtained, files this, an amendment of her complaint herein, as fol-

lows, that is to say, paragraph numbered "First" is amended to read as follows:

First. That she is a single woman, and is a citizen of the State of Alabama, one of the states of the United States of America.

ROBERT L. HUBBARD,
Attorney for Plaintiff.

State of California,
County of Los Angeles,—ss.

Elizabeth Knudsen, being first duly sworn according to law, deposes and says: I am the plaintiff in the above-entitled action. I have read the foregoing amendment to the complaint herein, and the same is true of my own knowledge.

ELIZABETH KNUDSEN. [132]

Subscribed and sworn to before me this 23d day of February, 1915.

[Seal] ANDREW M. STRONG,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 363—Civil. U. S. District Court, Southern District of California, Southern Division. Elizabeth Knudsen vs. Domestic Utilities Manufacturing Company, a Corporation, et al. Amendment to Complaint. Filed Feb. 23, 1915. Wm. M. Van Dyke, Clerk. By *F. F. Green*, Deputy.

That thereafter and on the 9th day of March, 1915, the defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis, and F. W. Sterling served upon plaintiff's attorney and filed separate notices of Motion for an Order Vacating the Order of Arrest issued in said action. Said notices being in words and figures as follows:

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), et al.,

Defendants.

**Notice of Motion of Defendant Edwin R. Crooker,
for an Order Vacating Order of Arrest.**

[133]

To the Plaintiff in the Above-entitled Action and to
R. L. Hubbard, Her Attorney:

You and each of you will please take notice that the defendant Edwin R. Crooker in the above-entitled action will on Monday, the 15th day of March, 1915, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, move the above-entitled court, at the courtroom thereof, in the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, for an order vacating and setting aside the order of arrest issued in said action, for the arrest of said defendant, on or about the 26th

day of January, 1915, and for an order releasing and exonerating the bail given by said defendant in said action.

Said motion will be made upon the following grounds, to wit:

I.

That said Court had no jurisdiction to make said order of arrest, for the reason that said Court had no jurisdiction of the person of said defendant or of the subject matter of said action.

II.

That the affidavits in said action upon which said order of arrest was based are insufficient, upon their face, to confer jurisdiction upon the Court to make said order.

III.

That the complaint in said action is insufficient, upon its face, to confer jurisdiction upon the Court to make said order.

Said motion will be based upon this notice of motion, and upon the records, files and pleadings in said action. [134]

Dated this 8th day of March, 1915.

DAVIS, KEMP & POST,
Attorneys for said Defendant.

[Endorsed]: No. 363-Civil. In the United States District Court, in and for the Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company, a Corporation, et al., Defendants. Notice of Motion of Defendant Edwin R. Crooker for an Order Vacating Order of Arrest. Received copy of the

within Notice this ninth day of February, 1915. Robert L. Hubbard, Attorney for Plaintiff. Filed Mar. 10, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Davis, Kemp & Post, Attorneys for said Defendant. [135]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), et al.,
Defendants.

**Notice of Motion of Defendant Louise E. Crooker,
for an Order Vacating Order of Arrest.**

To the Plaintiff in the Above-entitled Action and to
R. L. Hubbard, Her Attorney:

You and each of you will please take notice that the defendant Louise E. Crooker in the above-entitled action will on Monday, the 15th day of March, 1915, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, move the above-entitled court, at the courtroom thereof, in the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, for an order vacating and setting aside the order of arrest issued in said action, for the arrest of said defendant, on or about the 26th day of January, 1915, and for an order releasing and exonerating the bail given by said defendant in said action.

Said motion will be made upon the following grounds, to wit:

I.

That said Court had no jurisdiction to make said order of arrest, for the reason that said Court had no jurisdiction of the person of said defendant or of the subject matter of said action. [136]

II.

That the affidavits in said action upon which said order of arrest was based are insufficient, upon their face, to confer jurisdiction upon the Court to make said order.

III.

That the complaint in said action is insufficient, upon its face, to confer jurisdiction upon the Court to make said order.

Said motion will be based upon this notice of motion, and upon the records, files and pleadings in said action.

Dated this 8th day of March, 1915.

DAVIS, KEMP & POST,
Attorneys for said Defendant.

[Endorsed]: No. 363—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company, a Corporation et al., Defendants. Notice of Motion of Defendant Louise E. Crooker for an Order Vacating Order of Arrest. Received copy of the within Notice this ninth day of February, 1915, Robert L. Hubbard, Attorney for Plaintiff. Filed Mar. 10, 1915. Wm. M. Van Dyke, Clerk. By R. S.

Zimmerman, Deputy Clerk. Davis, Kemp & Post,
Attorneys for said Defendant. [137]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, (a Corporation), et al.,
Defendants.

**Notice of Motion of Defendant F. W. Sterling for
an Order Vacating Order of Arrest.**

To the Plaintiff in the Above-entitled Action and to
R. L. Hubbard, Her Attorney:

You and each of you will please take notice that the defendant F. W. Sterling in the above-entitled action will on Monday, the 15th day of March, 1915, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, move the above-entitled court, at the courtroom thereof, in the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, for an order vacating and setting aside the order of arrest issued in said action, for the arrest of said defendant, on or about the 26th day of January, 1915, and for an order releasing and exonerating the bail given by said defendant in said action.

Said motion will be made upon the following grounds, to wit:

I.

That said Court had no jurisdiction to make said order of arrest, for the reason that said Court had no

jurisdiction of the person of said defendant or of the subject matter of said action. [138]

II.

That the affidavits in said action upon which said order of arrest was based are insufficient, upon their face, to confer jurisdiction upon the Court to make said order.

III.

That the complaint in said action is insufficient, upon its face, to confer jurisdiction upon the Court to make said order.

Said motion will be based upon this notice of motion, and upon the records, files and pleadings in said action.

Dated this 8th day of March, 1915.

DAVIS, KEMP & POST,
Attorneys for said Defendant.

[Endorsed]: No. 363—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company, a Corporation, et al., Defendants. Notice of Motion of Defendant F. W. Sterling for an Order Vacating Order of Arrest. Received copy of the within Notice this ninth day of February, 1915. Robert L. Hubbard, Attorney for Plaintiff. Filed Mar. 10, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Davis, Kemp & Post, Attorneys for said Defendant. [139]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), et al.,
Defendants.

**Notice of Motion of Defendant W. P. Ellis for an
Order Vacating Order of Arrest.**

To the Plaintiff in the Above-entitled Action and to
R. L. Hubbard, Her Attorney:

You and each of you will please take notice that the defendant W. P. Ellis in the above-entitled action will on Monday, the 15th day of March, 1915, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, move the above-entitled court, at the courtroom thereof, in the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, for an order vacating and setting aside the order of arrest issued in said action, for the arrest of said defendant, on or about the 26th day of January, 1915, and for an order releasing and exonerating the bail given by said defendant in said action.

Said motion will be made upon the following grounds, to wit:

I.

That said Court had no jurisdiction to make said order of arrest, for the reason that said Court had no jurisdiction of the person of said defendant or of the

subject matter of said action. [140]

II.

That the affidavits in said action upon which said order of arrest was based are insufficient, upon their face, to confer jurisdiction upon the Court to make said order.

III.

That the complaint in said action is insufficient, upon its face, to confer jurisdiction upon the Court to make said order.

Said motion will be based upon this notice of motion, and upon the records, files and pleadings in said action.

Dated this 8th day of March, 1915.

DAVIS, KEMP & POST,
Attorneys for said Defendant.

[Endorsed]: No. 363-Civil. In the United States District Court, in and for the Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company, a Corporation, et al., Defendants. Notice of Motion of Defendant W. P. Ellis for an Order Vacating Order of Arrest. Received copy of the within Notice this ninth day of February, 1915. Robert L. Hubbard, Attorney for Plaintiff. Filed Mar. 10, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Davis, Kemp & Post, Attorneys for said Defendant. [141]

That thereafter and on the 13th day of March, 1915, and before the hearing of said notices of motion to dismiss said orders of arrest, said defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F.

W. Sterling, having first obtained leave of Court so to do, served upon plaintiff's attorney and filed Amended Notices of Motion for an Order Vacating Order of Arrest in said action; said amended notices of Motion being in words and figures as follows:

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), et al.,

Defendants.

**Amended Notice of Motion of Defendant Edwin R.
Crooker for an Order Vacating Order of Arrest.**

To the Plaintiff in the Above-entitled Action and to
R. L. Hubbard, Her Attorney:

You and each of you will please take notice that the defendant Edwin R. Crooker in the above-entitled action will on Monday, the 22d day of March, 1915, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, move the above-entitled court, at the courtroom thereof, in the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, for an order vacating and setting aside the order of arrest issued in said action, for the arrest of said defendant, on or about the 26th day of January, 1915, and for an order releasing and exonerating the bail given by said defendant in said action. [142]

Said motion will be made upon the following grounds, to wit:

I.

That said Court had no jurisdiction to make said order of arrest, for the reason that said Court had no jurisdiction of the person of said defendant or of the subject matter of said action.

II.

That the affidavits in said action upon which said order of arrest was based are insufficient, upon their face, to confer jurisdiction upon the Court to make said order.

III.

That the complaint in said action is insufficient, upon its face, to confer jurisdiction upon the Court to make said order.

IV.

That said order of arrest is void, for the reason that at the time said order of arrest was made no summons had been issued in said action.

Said motion will be based upon this notice of motion, and upon the records, files and pleadings in said action.

Dated this 12th day of March, 1915.

DAVIS, KEMP & POST,
Attorneys for said Defendant.

Good cause appearing therefor, leave is granted to the above-named defendant to file an amended notice of motion for an order vacating order of arrest in the above-entitled action.

Dated this 13th day of March, 1915.

BLEDSON,
Judge. [143]

[Endorsed]: No. 363-Civil. In the United States District Court, in and for the Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company, a Corporation, et al., Defendants. Amended Notice of Motion of Defendant Edwin R. Crooker for an Order Vacating Order of Arrest. Received copy of the within Amd. Notice this 13th day of March, 1915. Robert. L. Hubbard, Attorney for Plaintiff. Filed Mar. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Davis, Kemp & Post, Attorneys for said Defendant. [144]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, et al.,
Defendants.

**Amended Notice of Motion of Defendant Louise E.
Crooker for an Order Vacating Order of Arrest.**

To the Plaintiff in the Above-entitled Action, and to
R. L. Hubbard, Her Attorney:

You and each of you will please take notice that the defendant Louise E. Crooker in the above-entitled action will on Monday, the 22d day of March, 1915, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, move the above-entitled court, at the courtroom thereof, in the Federal Building, in the City of Los Angeles, County

of Los Angeles, State of California, for an order vacating the setting aside the order of arrest issued in said action, for the arrest of said defendant, on or about the 26th day of January, 1915, and for an order releasing and exonerating the bail given by said defendant in said action.

Said motion will be made upon the following grounds, to wit:

I.

That said Court had no jurisdiction to make said order of arrest, for the reason that said Court had no jurisdiction of the person of said defendant or of the subject matter of said action; [145]

II.

That the affidavits in said action upon which said order of arrest was based are insufficient, upon their face, to confer jurisdiction upon the Court to make said order;

III.

That the complaint in said action is insufficient, upon its face, to confer jurisdiction upon the Court to make said order.

IV.

That said order of arrest is void, for the reason that at the time said order of arrest was made no summons had been issued in said action.

Said motion will be based upon this notice of motion, and upon the records, files and pleadings in said action.

Dated this 12th day of March, 1915.

DAVIS, KEMP & POST,
Attorneys for said Defendant.

Good cause appearing therefor, leave is granted to the above-named defendant to file an amended notice of motion for an order vacating order of arrest in the above-entitled action.

Dated this 13th day of March, 1915.

BLEDSOE,

Judge.

[Endorsed]: No. 363—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. Elizabeth Kundsén, Plaintiff, vs. Domestic Utilities Manufacturing Company, a Corporation, et al., Defendants. Amended Notice of Motion of Defendant Louise E. Crooker for an Order Vacating Order of Arrest. Received Copy of the Within Amd. Notice this 13th day of March, 1915. Robert L. Hubbard, Attorney for Plaintiff. Filed Mar. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Davis, Kemp & Post, Attorneys for said Defendant. [146]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, et al.,
Defendants.

**Amended Notice of Motion of Defendant F. W.
Sterling for an Order Vacating Order of Arrest.**

To the Plaintiff in the Above-entitled Action, and to
R. L. Hubbard, Her Attorney:

You and each of you will please take notice that the defendant F. W. Sterling in the above-entitled action will on Monday, the 22d day of March, 1915, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, move the above-entitled court, at the courtroom thereof, in the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, for an order vacating and setting aside the order of arrest issued in said action, for the arrest of said defendant, on or about the 26th day of January, 1915, and for an order releasing and exonerating the bail given by said defendant in said action.

Said motion will be made upon the following grounds, to wit:

I.

That said Court had no jurisdiction to make said order of arrest, for the reason that said Court had no jurisdiction of the person of said defendant or of the subject matter of said action. [147]

II.

That the affidavits in said action upon which said order of arrest was based are insufficient, upon their face, to confer jurisdiction upon the Court to make said order.

III.

That the complaint in said action is insufficient,

upon its face, to confer jurisdiction upon the Court to make said order.

IV.

That said order of arrest is void, for the reason that at the time said order of arrest was made no summons had been issued in said action.

Said motion will be based upon this notice of motion, and upon the records, files and pleadings in said action.

Dated this 12th day of March, 1915.

DAVIS, KEMP & POST,
Attorneys for said Defendant.

Good cause appearing therefor, leave is granted to the above-named defendant to file an amended notice of motion for an order vacating order of arrest in the above-entitled action.

Dated this 13th day of March, 1915.

BLED SOE,
Judge.

[Endorsed]: No. 363—Civil. In the United States District Court, in and for the Southern District of California, Southern Division, Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company, a Corporation, et al., Defendants. Amended Notice of Motion of Defendant F. W. Sterling for an Order Vacating Order of Arrest. Received Copy of the Within Amd. Notice this 13th Day of March, 1915. Robert L. Hubbard, Attorney for Plaintiff. Filed Mar. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Davis, Kemp & Post, Attorneys for said Defendant.
[148]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, et al.,
Defendants.

**Amended Notice of Motion of Defendant W. P. Ellis
for an Order Vacating Order of Arrest.**

To the Plaintiff in the Above-entitled Action, and to
R. L. Hubbard, Her Attorney:

You and each of you will please take notice that the defendant W. P. Ellis in the above-entitled action will on Monday, the 22d day of March, 1915, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, move the above-entitled court, at the courtroom thereof, in the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, for an order vacating and setting aside the order of arrest issued in said action, for the arrest of said defendant, on or about the 26th day of January, 1915, and for an order releasing and exonerating the bail given by said defendant in said action.

Said motion will be made upon the following grounds, to wit:

I.

That said Court had no jurisdiction to make said order of arrest, for the reason that said Court had

no jurisdiction of the person of said defendant or of the subject matter of said action;

II. [149]

That the affidavits in said action upon which said order of arrest was based are insufficient, upon their face, to confer jurisdiction upon the Court to make said order;

III.

That the complaint in said action is insufficient, upon its face, to confer jurisdiction upon the Court to make said order.

IV.

That said order of arrest is void, for the reason that at the time said order of arrest was made no summons had been issued in said action.

Said motion will be based upon this notice of motion, and upon the records, files and pleadings in said action.

Dated this 12th day of March, 1915.

DAVIS, KEMP & POST,
Attorneys for said Defendant.

Good cause appearing therefor, leave is granted to the above-named defendant to file an amended notice of motion for an order vacating order of arrest in the above-entitled action.

BLEDSON,
Judge.

[Endorsed]: No. 363-Civil. In the United States District Court, in and for the Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company, a Corporation, et al., Defendants.

Amended Notice of Motion of Defendant W. P. Ellis for an Order Vacating Order of Arrest. Received Copy of the Within Amd. Notice this 13th day of March, 1915. Robert L. Hubbard, Attorney for Plaintiff. Filed Mar. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Davis, Kemp & Post, Attorneys for said Defendant. [150]

That said motion came up for hearing in said Court on the 22d day of March, 1915, and that the hearing thereof was regularly continued from time to time until the 19th day of April, 1915; and that on said 19th day of April, 1915, the motions of said defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis, and F. W. Sterling, as set out in said Amended Notices of Motions, were argued and submitted to the Court for its decision, and that thereafter, and on the 9th day of August, 1915, the said Court entered its order denying the motions of said defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling for an order vacating the order of arrest in said action, and each of them, and that on said 9th day of August, 1915, a Minute Order of said Court was entered in said action denying said motions as follows:

[Order Denying Motion to Vacate Orders of Arrest.]

No. 363—CIVIL, S. D.

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES CO., et al.,

Defendants.

This cause having heretofore been submitted to the Court for its consideration and decision on a motion to vacate certain orders for the arrest of defendants herein, and the Court having duly considered the same, and being fully advised in the premises.

It is now ordered that said motion to vacate said orders of arrest be, and the same is hereby, denied.

That no opinion was filed in said matter.

To which decision and order of the Court the defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling duly excepted. [151]

That thereafter and on the 14th day of August, 1915, said defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling applied to the Court for and obtained an order extending the time to prepare, serve and file their Bill of Exceptions to said decision and order of the Court; which said order is in words and figures as follows:

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, EDWIN R.
CROOKER, HARRY L. CROOKER,
LOUISE E. CROOKER, W. P. ELLIS and
F. W. STERLING,

Defendants.

Order Extending Time for Bill of Exceptions.

In this action the defendants, Edwin R. Crooker,

Louse E. Crooker, W. P. Ellis and F. W. Sterling, having this day applied to the Court for an order granting them, and each of them, additional time within which to prepare, file and serve their Bill of Exceptions to the decision and order of the Court entered in said action on the 9th day of August, 1915, denying the motion of said defendants, and each of them, to vacate the order of arrest in said action, and it appearing to the Court that this is a proper case for this order; [152]

NOW, THEREFORE, on motion of Davis, Kemp & Post, attorneys for said defendants, it is hereby ordered that said defendants, Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, be, and they hereby are, granted twenty (20) days' additional time within which to prepare, serve and file their bill of exceptions to said decision and order.

Dated this 14th day of August, 1915.

BLEDSOE,

Judge.

[Endorsed]: Civ. No. 363. In the United States District Court, in and for the Southern District of California, Southern Division. Elizabeth Knudsen vs. Domestic Utilities Mfg. Co., a Corp., et al. Order Extending Time for Bill of Exceptions. Received Copy of the Within Order this 16th day of August, 1915. Robert L. Hubbard, *B*, Attorney for Plaintiff. Filed Aug. 16, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Davis, Kemp & Post, Attorneys for Defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling. [153]

That thereafter and on the 7th day of September, 1915, and within the time limited by said order extending time to prepare, serve and file their Bill of Exceptions, said defendants, Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, served upon plaintiff's attorney in said action and filed with said Court, their proposed Bill of Exceptions therein.

That thereafter and on the 8th day of September, 1915, an order was made by said Court granting the plaintiff, Elizabeth Knudsen, twenty days additional time within which to propose amendments to defendants' Bill of Exceptions.

That thereafter and on the 30th day of September, 1915, an order was duly made by said Court granting the plaintiff, Elizabeth Knudsen, thirty days additional time within which to propose amendments to defendants' Bill of Exceptions, and that thereafter and on the 28th day of October, 1915, said plaintiff proposed amendments to defendants' Bill of Exceptions, which said amendments so proposed by said plaintiff were accepted by said defendants and are incorporated herein.

WHEREFORE, the defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, pray that the foregoing, their Bill of Exceptions to the decision and order of the Court denying the motions of the said defendants, and each of them, to vacate the said order of arrest in said action, containing all the proceedings had therein, may be settled and allowed.

Dated this 29th day of October, 1915.

DAVIS, KEMP & POST,
Attorneys for Defendants, Edwin R. Crooker, Louise
E. Crooker, W. P. Ellis and F. W. Sterling.
[154]

[Stipulation as to Bill of Exceptions.]

It is hereby stipulated that the foregoing bill of exceptions is a full, true and correct Bill of Exceptions and that the same may be settled and allowed by the Court.

Dated this 29th day of October, 1915.

ROBERT L. HUBBARD,
Attorney for Plaintiff.
DAVIS, KEMP & POST,
Attorneys for Defendants, Edwin R. Crooker, Louise
E. Crooker, W. P. Ellis, and F. W. Sterling.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing Bill of Exceptings, containing all of the proceedings had upon the motion of the defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, and each of them, to vacate the order of arrest issued in said action, is a true and correct Bill of Exceptions and is hereby settled and allowed and ordered to be filed.

Dated this 30th day of October, 1915.

BENJAMIN F. BLEDSOE,
Judge.

(Written in ink: Who heard said Cause.)

[Endorsed]: Original. No. 363 Civ. In the
United States District Court, in and for the South-

ern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Co., a Corp., et al. Defendants Engrossed Bill of Exceptions. Filed Oct. 30, 1915. Wm. M. Van Dyke Clerk. By T. F. Green, Deputy Clerk. Davis, Kemp & Post, Suite 812 Marsh-Strong Bldg., Tel. Home A-5097, Main 1953, Los Angeles, Cal., Attorneys for Defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling. G. [155]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, EDWIN R.
CROOKER, HARRY L. CROOKER,
LOUISE E. CROOKER, W. P. ELLIS and
F. W. STERLING,

Defendants.

Petition for Writ of Error.

Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, defendants in the above-entitled action, feeling themselves aggrieved by the decision and order entered in said action on the 9th day of August, 1915, denying the motion of said defendants, and each of them, to vacate the order of arrest issued in said action, come now by Davis, Kemp & Post, their attorneys, and file herewith an

assignment of errors and petition said Court for an order allowing said defendants to procure a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendants shall give and furnish upon said writ of error.

And your petitioners will ever pray.

Dated September 7th, 1915.

DAVIS, KEMP & POST,
Attorneys for Defendants Edwin R. Crooker, Louise
E. Crooker, W. P. Ellis and F. W. Sterling. [156]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, et al.,
Defendants.

United States of America,
Southern District of California,
Southern Division,
County of Los Angeles,—ss.

Affidavit [of Service of Petition for Writ of Error].

R. M. Phillips, being first duly sworn, deposes and says: That he is an attorney in the office of Davis, Kemp & Post, attorneys for the defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W.

Sterling, in the above-entitled action; that on the 7th day of September, 1915, at about the hour of 11:10 A. M. of said day, he personally served the within Petition for Writ of Error on Robert L. Hubbard, attorney for plaintiff in said action, by delivering to and leaving with the person in charge of the office of said Robert L. Hubbard, at 838 Van Nuys Building, in the City of Los Angeles, County of Los Angeles, State of California, a copy of said Petition for Writ of Error; that said office was open at said time and in charge of said person, who declined and refused to accept service of the same in writing.

R. M. PHILLIPS.

Subscribed and sworn to before me this 7th day of September, 1915.

[Seal]

R. R. VEAL,

Notary Public Within and for the County of Los Angeles, State of California. [157]

[Endorsed]: Original. Civ. No. 363. In the United States District Court, in and for the Southern District of California, Southern Division. Elizabeth Knudsen vs. Domestic Utilities Manufacturing Co., a Corp., et al. Petition for Writ of Error. Filed Sep. 7, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Davis, Kemp & Post, Suite 812 March-Strong Bldg. Tel. Home A—5037, Main 1953, Los Angeles, Cal., Attorneys for Defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling. [158]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, et al.,
Defendants.

Assignment of Errors.

Come now the defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, and file the following Assignment of Errors, upon which they will rely upon their prosecution of the writ of error in the above-entitled cause, petition for which writ of error is filed at the same time as this Assignment of Errors.

I.

The Court erred in denying the motion of defendant Edwin R. Crooker to vacate the order of arrest issued in said action, based upon the ground that said Court had no jurisdiction to make said order of arrest for the reason that the said Court had no jurisdiction of the person of said defendant or the subject matter of said action. This ruling was erroneous for the reason that at the time said order of arrest was made it affirmatively appeared from the complaint filed in said action that the plaintiff was a resident and citizen of the City of Washington, District of Columbia, and that the defendant Edwin R. Crooker was a resident and citizen of the State of California; and that it affirmatively appeared

therefrom that the diversity of citizenship necessary to confer jurisdiction on this Court of the person of said defendant or of the subject matter of said [159] action, did not exist, and that the amendment to said complaint filed in said action on the 23d day of February, 1915, after the arrest of said defendant and his release on bail, had no retroactive effect and could not operate to violate said order of arrest made by the Court at a time when it affirmatively appeared from the record upon which the Court was called to act that said Court was without jurisdiction of the person of said defendant or subject matter of said action, and for the further reason that said amendment to said complaint does not allege the diverse citizenship necessary to confer jurisdiction upon said Court of the person of said defendant or of the subject matter of said action to have existed at the time of the commencement of said action, and for the further reason that jurisdiction and authority to issue an order of arrest in a civil action is based, solely and exclusively under the laws of the State of California, upon the affidavits filed in support of the application for such order of arrest, and that therefore the Court had no right to look beyond said affidavits to the complaint in said action in passing upon the application for said order of arrest.

II.

The court erred in denying the motion of the defendant Edwin R. Crooker to vacate the order of arrest issued in said action, based upon the ground that the affidavits in said action upon which said

order of arrest was based, are insufficient upon their face to confer jurisdiction upon the Court to make said order. This ruling was erroneous for the reason that authority to issue an order of arrest in a civil action is based solely and exclusively upon the affidavits filed support of the application for such order and said affidavits contain no allegation whatsoever as to the citizenship of the plaintiff in said action, and do not show the existence of the diversity of citizenship [160] necessary to confer jurisdiction upon said Court in said action, and for the further reason that said affidavits are made largely and as to many important, necessary and essential allegations therein upon information and belief and that the facts upon which said information and belief was founded are not stated therein, and for the further reason that the facts stated in said affidavits are insufficient to warrant an order for the arrest of said defendant.

III.

The Court erred in denying the motion of defendant Edwin R. Crooker to vacate the order or arrest issued in said action, based upon the ground that the complaint in said action is insufficient upon its face to confer jurisdiction upon the Court to make said order. This ruling was erroneous for the reason that the complaint in said action, at the time of the issuance of said order of arrest, showed affirmatively upon its face that the diversity of citizenship necessary to confer jurisdiction in said action upon said Court did not exist, and for the further reason that it does not appear from said complaint that a

cause of action exists against said defendant and for the further reason that the amendment to the complaint filed in said action had no retroactive effect to validate the order of arrest issued at the time when it affirmatively appeared from the record that the Court had no jurisdiction of the person of said defendant or of the subject matter of said action, and for the further reason that said amendment to said complaint does not show the diversity of citizenship necessary to confer jurisdiction upon said Court to have existed at the commencement of said action, and for the further reason that the jurisdiction and authority of the Court to issue an order of arrest in a civil action is based, under the laws of the State of California, solely [161] and exclusively, on the affidavits filed in support of the application for Court in passing upon the application for the said order of arrest, and that therefore, the Court in passing upon the application for such order of arrest cannot look beyond such affidavits to the complaint, or other proceedings in said action.

IV.

The Court erred in denying the motion of defendant Edwin R. Crooker to vacate the order of arrest issued in said action, based upon the ground that said order of arrest is void for the reason that at the time said order of arrest was made no summons had been issued in said action. This ruling was erroneous for the reason that the laws of the State of California do not authorize the issuance or an order of arrest in a civil action except at the time of the issuing of the summons in said action or at any time

afterwards before judgment.

V.

The Court erred in denying the motion of defendant Louise E. Crooker to vacate the order of arrest issued in said action, based upon the ground that said Court had no jurisdiction to make said order of arrest for the reason that the said Court had no jurisdiction of the person of said defendant or the subject matter of said action. This ruling was erroneous for the reason that at the time said order of arrest was made it affirmatively appeared from the complaint filed in said action that the plaintiff was a resident and citizen of the City of Washington, District of Columbia, and that the defendant Louise E. Crooker was a resident and citizen of the State of California; and that it affirmatively appeared therefrom that the diversity of citizenship necessary to confer jurisdiction on this Court of the person of said defendant or of the subject matter of said action, did not exist, and that the amendment to said complaint filed in said action on the 23d day of February, 1915, after the [162] arrest of said defendant and her release on bail, had no retroactive effect and could not operate to validate said order of arrest made by the Court at a time when it affirmatively appeared from the record upon which the Court was called to act that said Court was without jurisdiction of the person of said defendant or subject matter of said action, and for the further reason that said amendment to said complaint does not allege the diverse citizenship necessary to confer jurisdiction upon said Court of the person of said

defendant or of the subject matter of said action to have existed at the time of the commencement of said action, and for the further reason that jurisdiction and authority to issue an order of arrest in a civil action is based, solely and exclusively under the laws of the State of California, upon the affidavits filed in support of the application for such order of arrest, and that therefore the Court had no right to look beyond said affidavits to the complaint in said action in passing upon the application for said order of arrest.

VI.

The Court erred in denying the motion of the defendant Louise E. Crooker to vacate the order of arrest issued in said action, based upon the ground that the affidavits in said action upon which said order of arrest was based, are insufficient upon their face to confer jurisdiction upon the Court to make said order. This ruling was erroneous for the reason that authority to issue an order of arrest in a civil action is based solely and exclusively upon the affidavits filed in support of the application for such order and said affidavits contain no allegation whatsoever as to the citizenship of the plaintiff in said action, and do not show the existence of the diversity of citizenship necessary to confer jurisdiction upon said Court in said action, and for the further reason that said affidavits are made largely and as to many important, necessary and essential [163] allegations therein upon information and belief and that the facts upon which said information and belief was founded are not stated therein, and for the

further reason that the facts stated in said affidavits are insufficient to warrant an order for the arrest of said defendant.

VII.

The Court erred in denying the motion of defendant Louise E. Crooker to vacate the order of arrest issued in said action, based upon the ground that the complaint in said action is insufficient upon its face to confer jurisdiction upon the Court to make said order. This ruling was erroneous for the reason that the complaint in said action, at the time of the issuance of said order of arrest, showed affirmatively upon its face that the diversity or citizenship necessary to confer jurisdiction in said action upon said Court did not exist, and for the further reason that it does not appear from said complaint that a cause of action exists against defendant and for the further reason that the amendment to the complaint filed in said action had no retroactive effect to validate the order of arrest issued at the time when it affirmatively appeared from the record that the Court had no jurisdiction of the person of said defendant or of the subject matter of said action, and for the further reason that said amendment to said complaint does not show the diversity of citizenship necessary to confer jurisdiction upon said Court to have existed at the commencement of said action, and for the further reason that the jurisdiction and authority of the Court to issue an order of arrest in a civil action is based, under the laws of the State of California, solely and exclusively, on the affidavits filed in support of the application for the said order

of arrest, and that therefore the Court in passing upon the application for such order of arrest cannot look beyond such affidavits to the complainant, or other proceedings in said action. [164]

VIII.

The Court erred in denying the motion of defendant Louise E. Crooker, to vacate the order of arrest issued in said action, based upon the ground that said order of arrest is void for the reason that at the time said order of arrest was made no summons had been issued in said action. This ruling was erroneous for the reason that the laws of the State of California do not authorize the issuance of an order of arrest in a civil action except at the time of the summons in said action or at any time afterwards before judgment.

IX.

The Court erred in denying the motion of defendant W. P. Ellis to vacate the order of arrest issued in said action, based upon the ground that said Court had no jurisdiction to make said order of arrest for the reason that the said Court had no jurisdiction of the person of said defendant or the subject matter of said action. This ruling was erroneous for the reason that at the time said order of arrest was made it affirmatively appeared from the complaint filed in said action that the plaintiff was a resident and citizen of the City of Washington, District of Columbia, and that the defendant W. P. Ellis was a resident and citizen of the State of California; and that it affirmatively appeared therefrom that the diversity of citizenship necessary to confer

jurisdiction on this Court of the person of said defendant or of the subject matter of said action, did not exist, and that the amendment to said complaint filed in said action on the 23d day of February, 1915, after the arrest of said defendant and his release on bail, had no retroactive effect and could not operate to validate said order of arrest made by the Court at a time when it affirmatively appeared from the record upon which the Court was called to act that said Court was without jurisdiction of the person of said defendant or subject matter of said action, and [165] for the further reason that said amendment to said complaint does not allege the diverse citizenship necessary to confer jurisdiction upon said Court of the person of said defendant or of the subject matter of said action to have existed at the time of the commencement of said action, and for the further reason that jurisdiction and authority to issue an order of arrest in a civil action is based, solely and exclusively under the laws of the State of California, upon the affidavits filed in support of the application for such order of arrest, and that therefore the Court had no right to look beyond said affidavits to the complaint in said action in passing upon the application for said order of arrest.

X.

The Court erred in denying the motion of the defendant W. P. Ellis to vacate the order of arrest issued in said action, based upon the ground that the affidavits in said action upon which said order of arrest was based, are insufficient upon their face to confer jurisdiction upon the Court to make said

order. This ruling was erroneous for the reason that authority to issue an order of arrest in a civil action is based solely and exclusively upon the affidavits filed in support of the application for such order and said affidavits contain no allegation whatsoever as to the citizenship of the plaintiff in said action, and do not show existence of the diversity of citizenship necessary to confer jurisdiction upon said court in said action, and for the further reason that said affidavits are made largely and as to many important, necessary and essential allegations therein upon information and belief and that the facts upon which said information and belief was founded are not stated therein, and for the further reason that the facts stated in said affidavits are insufficient to warrant an order for the arrest of said defendant. [166]

XI.

The Court erred in denying the motion of defendant W. P. Ellis to vacate the order of arrest issued in said action, based upon the ground that the complaint in said action is insufficient upon its face to confer jurisdiction upon the Court to make said order. This ruling was erroneous for the reason that the complaint in said action, at the time of the issuance of said order of arrest, showed affirmatively upon its face that the diversity of citizenship necessary to confer jurisdiction in said action upon said Court did not exist, and for the further reason that it does not appear from said complaint that a cause of action exists against said defendant and for the

further reason that the amendment to the complaint filed in said action had no retroactive effect to validate the order of arrest issued at the time when it affirmatively appeared from the record that the Court had no jurisdiction of the person of said defendant or of the subject matter of said action, and for the further reason that said amendment to said complaint does not show the diversity of citizenship necessary to confer jurisdiction upon said Court to have existed at the commencement of said action, and for the further reason that the jurisdiction and authority of the Court to issue an order of arrest in a civil action is based, under the laws of the State of California, solely and exclusively, on the affidavits filed in support of the application for the said order of arrest, and that therefore the Court in passing upon the application for such order of arrest cannot look beyond such affidavits to the complaint, or other proceedings in said action.

XII.

The Court erred in denying the motion of defendant W. P. Ellis to vacate the order of arrest issued in said action, based [167] upon the ground that said order of arrest is void for the reason that at the time said order of arrest was made no summons had been issued in said action. This ruling was erroneous for the reason that the laws of the State of California do not authorize the issuance of an order of arrest in a civil action except as the time of the issuing of the summons in said action or at any time afterwards before judgment.

XIII.

The Court erred in denying the motion of de-

fendant F. W. Sterling to vacate the order of arrest issued in said action based upon the ground that said Court had no jurisdiction to make said order of arrest for the reason that the said Court had no jurisdiction of the person of said defendant or the subject matter of said action. This ruling was erroneous for the reason that at the time said order of arrest was made it affirmatively appeared from the complaint filed in said action that the plaintiff was a resident and citizen of the City of Washington, District of Columbia, and that the defendant F. W. Sterling was a resident and citizen of the State of California; and that it affirmatively appeared therefrom that the diversity of citizenship necessary to confer jurisdiction on this Court of the person of said defendant or of the subject matter of said action, did not exist, and that the amendment to said complaint filed in said action on the 23d day of February, 1915, after the arrest of said defendant and his release on bail, had no retroactive effect and could not operate to validate said order of arrest made by the Court at a time when it affirmatively appeared from the record upon which the Court was called to act that said Court was without jurisdiction of the person of said defendant or subject matter of said action, and for the further [168] reason that said amendment to said complaint does not allege the diverse citizenship necessary to confer jurisdiction upon said Court of the person of said defendant or of the subject matter of said action to have existed at the time of the commencement of said action, and for the further reason that jurisdic-

tion and authority to issue an order of arrest in a civil action is based, solely and exclusively under the laws of the State of California, upon the affidavits filed in support of the application for such order of arrest, and that therefore the Court had no right to look beyond said affidavits to the complaint in said action in passing upon the application for said order of arrest.

XIV.

The Court erred in denying the motion of the defendant F. W. Sterling to vacate the order of arrest issued in said action, based upon the ground that the affidavits in said action upon which said order of arrest was based, are insufficient upon their face to confer jurisdiction upon the Court to make said order. This ruling was erroneous for the reason that authority to issue an order of arrest in a civil action is based solely and exclusively upon the affidavits filed in support of the application for such order and said affidavits contain no allegation whatsoever as to the citizenship of the plaintiff in said action, and do not show the existence of the diversity of citizenship necessary to confer jurisdiction upon said Court in said action, and for the further reason that said affidavits are made largely and as to many important, necessary and essential allegations therein upon information and belief and that the facts upon which said information and belief was founded are not stated therein, and for the further reason that the facts stated in said affidavits are insufficient to warrant an order for the arrest of said defendant.

XV.

The Court erred in denying the motion of defendant F. W. Sterling to vacate the order of arrest issued in said action, based upon the ground that the complaint in said action is insufficient upon its face to confer jurisdiction upon the Court to make said order. This ruling was erroneous for the reason that the complaint in said action, at the time of the issuance of said order of arrest, showed affirmatively upon its face that the diversity of citizenship necessary to confer jurisdiction in said action upon said Court did not exist, and for the further reason that it does not appear from said complaint that a cause of action exists against defendant and for the further reason that the amendment to the complaint filed in said action had no retroactive effect to validate the order of arrest issued at the time when it affirmatively appeared from the record that the Court had no jurisdiction of the person of said defendant or of the subject matter of said action, and for the further reason that said amendment to said complaint does not show the diversity of citizenship necessary to confer jurisdiction upon said Court to have existed at the commencement of said action, and for the further reason that the jurisdiction and authority of the Court to issue an order of arrest in a civil action is based, under the laws of the State of California, solely and exclusively, on the affidavits filed in support of the application for the said order of arrest, and that therefore the Court in passing upon the application for such order of arrest cannot look beyond such affidavits to the complaint, or other

proceedings in said action.

XVI.

The Court erred in denying the motion of defendant F. W. Sterling to vacate the order of arrest issued in said action, [170] based upon the ground that said order of arrest is void for the reason that at the time said order of arrest was made no summons had been issued in said action. This ruling was erroneous for the reason that the laws of the State of California do not authorize the issuance of an order of arrest in a civil action except at the time of the issuing of the summons in said action or at any time afterwards before judgment.

And upon the foregoing Assignment of Errors and upon the record in said case, the defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling pray that said decision and order of Court denying their Motion to Vacate said Order of Arrest be reversed and that the Court below be directed to enter an order vacating the Order of Arrest issued in said action.

Dated this 7th day of September, 1915.

DAVIS, KEMP & POST,

Attorneys for Defendants, Edwin R. Crooker, Louise
E. Crooker, W. P. Ellis and F. W. Sterling.

[171]

*In the District Court of the United States, Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, et al,

Defendants.

Affidavit [of Service of Assignment of Errors].

United States of America,
Southern District of California,
Southern Division,
County of Los Angeles,—ss.

R. M. Phillips, being first duly sworn, deposes and says: That he is an attorney in the office of Davis, Kemp & Post, attorneys for the defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, in the above-entitled action; that on the 7th day of September, 1915, at about the hour of 11:10 A. M., of said day he personally served the within Assignment of Errors on Robert L. Hubbard, attorney for plaintiff in said action, by delivering to and leaving with the person in charge of the office of said Robert L. Hubbard, at 838 Van Nuys Building, in the City of Los Angeles, County of Los Angeles, State of California, a copy of said Assignment of Errors; that said office was open at said time and in charge of said person, who declined and refused to accept service of the same in writing.

R. M. PHILLIPS.

Subscribed and sworn to before me this 7th day of September, 1915.

[Seal]

R. R. VEAL,

Notary Public within and for the County of Los Angeles, State of California. [172]

[Endorsed]: Original. Civ. No. 363. In the United States District Court, in and for the Southern District of California, Southern Division. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company, a Corp., et al., Defendants. Assignment of Errors. Filed Sept. 7, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Davis, Kemp & Post, Suite 812 Marsh-Strong Bldg., Tel. Home A-5037, Main 1953, Los Angeles, Cal., Attorneys for Defendants, Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling. [173]

*In the District Court of the United States Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, EDWIN R.
CROOKER, HARRY L. CROOKER,
LOUISE E. CROOKER, W. P. ELLIS and
F. W. STERLING,

Defendants.

Order Allowing Writ of Error.

Upon motion of Davis, Kemp & Post, Attorneys

for defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, in this action, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court for the Ninth Circuit, the decision and order heretofore entered herein on the 9th day of August, 1915, denying the motion of said defendants, and each of them, to vacate the order of arrest issued in said action.

Dated this 7th day of September, 1915.

BLEDSON,
Judge.

[Endorsed]: Original. Civ. No. 363. In the United States District Court in and for the Southern District of California, Southern Division. Elizabeth Knudsen vs. Domestic Utilities Mfg. Co., a Corp., et al. Order Allowing Writ of Error. Filed Sept. 7, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Davis Kemp, & Post, Suite 812 Marsh-Strong Bldg., Tel. Home A-5037, Main 1953, Los Angeles, Cal., Attorneys for Defendants, Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling. [174]

*In the District Court of the United States Southern
District of California, Southern Division.*

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, EDWIN R.
CROOKER, HARRY L. CROOKER,
LOUISE E. CROOKER, W. P. ELLIS and
F. W. STERLING,

Defendants.

Order Fixing Bond on Writ of Error.

The defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, having this day filed their petition for writ of error from the decision and order made and entered herein on the 9th day of August, 1915, denying the motion of said defendants, and each of them, to vacate the order of arrest entered in said action to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which the defendants should give and furnish upon said writ of error, and said petition having this day been duly allowed;

NOW, THEREFORE, it is ordered that said defendants file with the Clerk of this Court a good and sufficient bond in the sum of \$250.00, to the effect that if the said defendants and plaintiffs in error shall prosecute the said writ of error with effect and answer all damages and costs if they fail to

make their plea good, then the said obligation to be void, otherwise to remain in full force and effect; the said bond to be approved [175] by the Clerk of this Court.

Dated September 7, 1915.

BLEDSON,
Judge.

[Endorsed]: Original. Civ. No. 363. In the United States District Court, in and for the Southern District of California, Southern Division. Elizabeth Knudsen vs. Domestic Utilities Mfg. Co., a Corp., et al. Order Fixing Bond on Writ of Error. Filed Sep. 7, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Davis, Kemp & Post, Suite 812 Marsh-Strong Bldg., Tel. Home A-5037, Main 1953, Los Angeles, Cal., Attorneys for Defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling. [176]

In the United States District Court, Southern District of California, Southern Division.

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, EDWIN R.
CROOKER, HARRY L. CROOKER,
LOUISE E. CROOKER, W. P. ELLIS and
F. W. STERLING,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that NATIONAL SURETY COMPANY OF NEW YORK, a corporation, duly licensed and authorized by the State of California to transact business as surety, within said State of Californis, as surety, is held and firmly bound unto Elizabeth Knudsen, the plaintiff above-named, in the sum of Two Hundred and Fifty (\$250.00), to be paid to the said Elizabeth Knudsen, her executors or administrators, for which payment well and truly to be made we bind ourselves, jointly and severally, and our, and each of our, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 8th day of September, A. D. 1915.

The condition of the above obligation is such that WHEREAS, the defendants, Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, in the above-entitled action, have sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the [177] decision and order of the Court in said action denying the motion of said defendants, and each of them, to vacate an Order of Arrest issued in said action, therein rendered on the 9th day of August, 1915;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling shall prosecute said writ to effect and answer all costs and damages if they fail to make good

their plea, then this obligation to be void, otherwise to remain in full force and effect.

NATIONAL SURETY COMPANY OF NEW
YORK.

By CATESBY C. THOM, [Seal]

Its Attorney in Fact.

Approved.

BLEDSON, J.

State of California,
County of Los Angeles,—ss.

On this 8th day of September in the year one thousand nine hundred and fifteen, before me, William M. Curran, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Catesby C. Thom, known to me to be the duly authorized Attorney in Fact of National Surety Company, and the same person whose name is subscribed to the within instrument as the attorney in fact of said company, and the said Catesby C. Thom, acknowledged to me that he subscribed the name of National Surety Company thereto as principal, and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

WILLIAM M. CURRAN,

Notary Public in and for Los Angeles County, State
of California. [178]

[Endorsed]: Original. Civ. No. 363. In the United States District Court in and for the Southern District of California, Southern Division. Eliza-

beth Knudsen, Plaintiff, vs. Domestic Utilities Manufacturing Company, a Corp., et al., Defendants. Bond on Writ of Error. Filed Sep. 10, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Davis, Kemp & Post, Suite 812 Marsh-Strong Bldg., Tel. Home A-5037, Main 1953, Los Angeles, Cal., Attorneys for Defendants Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling. [179]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California.

Clerk's Office.

No. Civ.-363.

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY, a Corporation, et al.,
Defendants.

Praecipe [for Transcript of Record].

To the Clerk of Said Court:

Sir: Please issue a certified copy of the record in the above-entitled action, consisting of:

Bill of Exceptions.

Petition for Writ of Error.

Assignments of Error.

Order Allowing Writ of Error.

Order Fixing Bond on Writ of Error.

Bond on Writ of Error.

Writ of Error.

Citation in Error.

Order Enlarging the Time for Docketing the Case and Filing the Record in the Circuit Court of Appeals.

Dated this 2d day of November, 1915.

DAVIS, KEMP & POST,

Attorneys for Defendants and Plaintiffs in Error

Edwin R. Crooker, Louise E. Crooker, W. P.

Ellis and F. W. Sterling.

[Endorsed]: Original. No. Civ.-363. U. S. District Court, Southern District of California. Elizabeth Knudsen, Plaintiff, vs. Domestic Utilities Mfg. Co., a Corp., et al., Defendants. Praecipe for Certified Copy of Record. Filed Nov. 3, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [180]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 363-CIVIL.

ELIZABETH KNUDSEN,

Plaintiff,

vs.

DOMESTIC UTILITIES MANUFACTURING
COMPANY (a Corporation), EDWIN
R. CROOKER, HARRY L. CROOKER,
LOUISE E. CROOKER, W. P. ELLIS and
F. W. STERLING,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and eighty (180) type-written pages, numbered from 1 to 180, inclusive, to be a full, true and correct copy of the Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Order Fixing Bond on Writ of Error, Bond on Writ of Error, and Praecept for Preparation of Transcript of Record, in the above and therein-entitled matter, and that the same together constitute the record in said matter, as specified in the said Praecept for Transcript, filed in my office on behalf of the plaintiffs in error, by their attorneys of record. [181]

I do further certify that the cost of the foregoing record is \$101 20/100; the amount whereof has been paid me by Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, the plaintiffs in error in said matter.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 6th day of December, in the year of our Lord, one thousand nine hundred and fifteen, and of our Independence, the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
12/6/15. L. S. C.] [182]

[Endorsed]: No. 2704. United States Circuit Court of Appeals for the Ninth Circuit. Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling, Plaintiffs in Error, vs. Elizabeth Knudsen, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed December 10, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

**[Order Enlarging Time to December 31, 1915, to
Docket Cause and File Record in U. S. Circuit
Court of Appeals.]**

*In the United States Circuit Court of Appeals,
Ninth Judicial Circuit.*

EDWIN R. CROOKER, LOUISE E. CROOKER,
W. P. ELLIS and F. W. STERLING,
Plaintiffs in Error.

vs.

ELIZABETH KNUDSEN,
Defendant in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof with the clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the thirty-first day of December, 1915.

Dated at Los Angeles, this 29th day of September, 1915.

BLEDSON,
Judge.

[Endorsed]: No. 2704. United States Circuit Court of Appeals for the Ninth Circuit. Edwin R. Crooker, et al., Plaintiffs in Error, vs. Elizabeth Knudsen, Defendant in Error. Order Extending Time to File Record. Filed Oct. 7, 1915. F. D. Monckton, Clerk. Refiled Dec. 10, 1915. F. D. Monckton, Clerk.

IN THE
 United States
 Circuit Court of Appeals
 FOR THE NINTH CIRCUIT.

No. 2704.

Edwin R. Crooker, Louise E.
 Crooker, W. P. Ellis and F. W.
 Sterling,

Plaintiffs in Error,

vs.

Elizabeth Knudsen,

Defendant in Error.

Filed

JAN 31 1918

F. D. Munch

BRIEF OF PLAINTIFFS IN ERROR.

R. W. KEMP and
 DAVIS, KEMP & POST,
Attorneys for Plaintiffs in Error.

IN THE
United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 2704.

Edwin R. Crooker, Louise E.
Crooker, W. P. Ellis and F. W.
Sterling,

Plaintiffs in Error,

vs.

Elizabeth Knudsen,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This is an action brought by the defendant in error against the plaintiffs in error to recover from the plaintiffs in error the sum of \$75,407.52 as damages. Complaint in the action was filed January 26th, 1915, and summons was issued on the 27th day of January, 1915. Defendant in error also prayed that an order of arrest be issued by the District Court against the plaintiffs in

error and each of them under sections 479, 480 and 481 of the Code of Civil Procedure of the state of California. On the 26th day of January, 1915, in accordance with the prayer of the complaint, the Honorable Benjamin F. Bledsoe, judge of the District Court of the United States, Southern District of California, signed an order for the arrest of the plaintiffs in error, requiring the marshal to take the plaintiffs in error into custody and hold them to bail in the sum of \$10,000.00 each for Edwin R. Crooker and W. P. Ellis, and \$5000.00 each as to Louise E. Crooker and F. W. Sterling. On the 29th day of January, 1915, the marshal took the plaintiff in error Edwin R. Crooker into custody and on the 4th and 8th days of February, respectively, the marshal took into custody the plaintiffs in error Louise E. Crooker and F. W. Sterling, and on the 30th day of January, 1915, the marshal took into custody the plaintiff in error W. P. Ellis. Plaintiffs in error, and each of them, gave bail as required by said order of arrest. Harry L. Crooker, named as defendant in said complaint, was not served with any process and was not before the court.

On the 23rd day of February, by leave of court, the defendant in error filed an amendment to the complaint wherein she recited that she is a citizen of the state of Alabama, one of the states of the United States, changing the first allegation of her complaint wherein she alleged that she was a citizen of the District of Columbia.

On the 13th day of March, 1915, the plaintiffs in error severally and separately moved the court to vacate the order of arrest, which said motions were

made under the provisions of section 503 of the Code of Civil Procedure of the state of California, and which said motions were regularly heard and submitted to the court. Upon argument of counsel and on the 14th day of August, 1915, said motions, and each of them, were by the court denied; no opinion being filed by the Honorable Benjamin F. Bledsoe, to which said ruling the plaintiffs in error each, severally and separately, duly excepted. That thereafter and within the time required by law, the plaintiffs in error sued out a writ of error which was on the 7th day of September, 1915, allowed by the Honorable Benjamin F. Bledsoe. That within the time required by law plaintiffs in error prepared and filed a bill of exceptions in this Honorable Court, which said proceeding is for the purpose of reviewing and having set aside the order of the District Court refusing to vacate the order of arrest.

ASSIGNMENT OF ERRORS.

The plaintiffs in error, and each of them, relied upon the following assignment of errors:

I.

The court erred in denying the motion of the plaintiffs in error, and each of them, to vacate the order of arrest issued in said action, based upon the ground that said court had no jurisdiction to make said order of arrest for the reason that said court had no jurisdiction of the persons of the said plaintiffs in error, or either of them, or of the subject matter of said action. This ruling was erroneous for the reason that at the time said order of arrest was made it affirmatively appeared

from the complaint filed in said action that the defendant in error was a resident and citizen of the city of Washington, District of Columbia, and that the plaintiffs in error Edwin R. Crooker, Louise E. Crooker, F. W. Sterling and W. P. Ellis were residents and citizens of the state of California; and that it affirmatively appeared therefrom that the diversity of citizenship necessary to confer jurisdiction on this court of the persons of plaintiffs in error, or of the subject matter of said action, did not exist, and that the amendment to said complaint filed in said action on the 23rd day of February, 1915, after the arrest of the plaintiffs in error and their release on bail, had no retroactive effect and could not operate to validate said order of arrest made by the court at a time when it affirmatively appeared from the record upon which the court was called to act, that said court was without jurisdiction of the persons of said plaintiffs in error, or the subject matter of said action, and for the further reason that said amendment to said complaint does not allege the diverse citizenship necessary to confer jurisdiction upon said court of the persons of said plaintiffs in error or of the subject matter of said action to have existed at the time of the commencement of said action, and for the further reason that jurisdiction and authority to issue an order of arrest in a civil action is based solely and exclusively, under the laws of the state of California, upon the affidavits filed in support of the application for such order of arrest, and that therefore the court had no right to look beyond said affidavits to the complaint in said action in passing upon the application for said order of arrest.

II.

The court erred in denying the motions of the plaintiffs in error, and each of them, to vacate the order of arrest issued in said action, based upon the ground that the affidavits in said action, upon which said order of arrest was based, are insufficient on their face to justify the court in making said order. This ruling was erroneous for the reason that authority to issue an order of arrest in a civil action is based solely and exclusively upon the affidavits filed in support of the application for such order, and said affidavits contained no allegation whatsoever as to the citizenship of the defendant in error in said action, and do not show the existence of the diversity of citizenship necessary to confer jurisdiction on said court in said action, and for the further reason that said affidavits are made largely and as to many important and essential allegations therein upon information and belief, and that the facts upon which said information and belief was founded are not stated therein, and for the further reason that the facts stated in said affidavits are insufficient to warrant an order for the arrest of said plaintiffs in error, or either of them.

III.

The court erred in denying the motions of the plaintiffs in error, and each of them, to vacate the order of arrest issued in said action, based upon the ground that the complaint in said action is insufficient upon its face to confer jurisdiction upon the court to make said order. This ruling was erroneous for the reason that the complaint in said action at the time of the issuance

of said order of arrest, showed affirmatively upon its face that the diversity of citizenship necessary to confer jurisdiction in said action upon said court did not exist, and for the further reason that it does not appear from said complaint that a cause of action exists against said plaintiffs in error, and for the further reason that the amendment to the complaint filed in said action had no retroactive effect to validate the order of arrest issued at a time when it affirmatively appeared from the record that the court had no jurisdiction of the persons of said plaintiffs in error, or the subject matter of said action, and for the further reason that said amendment to the complaint does not show the diversity of citizenship necessary to confer jurisdiction upon said court to have existed at the commencement of said action, and for the further reason that the jurisdiction and authority of the court to issue an order of arrest in a civil action is based, under the laws of the state of California, solely and exclusively upon the affidavits filed in support of the application for such order of arrest, and that, therefore, the court in passing upon the application for such order of arrest cannot look beyond such affidavits to the complaint, or other proceedings in said action.

IV.

The court erred in denying the motions of the plaintiffs in error, and each of them, to vacate the order of arrest issued in said action, based upon the ground that said order of arrest is void for the reason that at the time said order of arrest was made no summons had been issued in said action. This ruling was er-

roneous for the reason that the laws of the state of California do not authorize the issuance of an order of arrest in a civil action except at the time of the issuance of the summons in said action, or at any time afterwards and before judgment.

ARGUMENT.

The order for the arrest of the plaintiffs in error was made under section 990 of the Revised Statutes of the United States, which reads as follows:

“No person shall be imprisoned for debt in any state on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished, and all modifications, conditions and restrictions upon imprisonment for debt provided by the laws of any state shall be applicable to the process issuing from the courts of the United States to be executed therein, and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state.”

The statutes of the state of California, under the head of “Provisional Remedies in Civil Actions,” are as follows:

Section 478 of the Code of Civil Procedure:

“No person can be arrested in a civil action except as prescribed in this code.”

Section 479 of the Code of Civil Procedure:

“The defendant may be arrested as herein prescribed in the following cases:

“(1) In an action for the recovery of money, or damages, on a cause of action arising upon con-

tract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors.

“(2) In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; or for misconduct or neglect in office, or in a professional employment, or for a wilful violation of duty.

“(3) In an action to recover the possession of personal property unjustly detained, when the property or any part thereof has been concealed, removed or disposed of, to prevent its being found or taken by the sheriff.

“(4) When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention or conversion of which the action is brought.

“(5) When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.”

Section 481 of the Code of Civil Procedure:

“The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section four hundred and seventy-nine. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of

arrest be made, the affidavit must be filed with the clerk of the court."

Section 483 of the Code of Civil Procedure:

"The order may be made at the time of the issuing of the summons, or any time afterwards before judgment. It must require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned, to the clerk of the court in which the action is pending."

Section 503 of the Code of Civil Procedure:

"A defendant arrested may, at any time before the trial of the action, or if there be no trial, before the entry of judgment, apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made."

The District Court of the United States, Southern District of California, took jurisdiction of this proceeding by reason of section 990 of the Revised Statutes of the United States and the statutes of California above quoted, and if said statutes did not exist, the District Court would not have had jurisdiction to order the plaintiffs in error into custody, and by section 990 of the Revised Statutes of the United States the same course of proceeding as existed in the state court is adopted by the courts of the United States.

A Proceeding for Arrest in a Civil Action is a Special Proceeding in the State of California, and the Statute Must be Strictly Construed.

Section 22 of the Code of Civil Procedure of the state of California provides:

“An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense.”

Section 23, C. C. P., provides:

“Every other remedy is a special proceeding.”

The law in California is well settled that in special proceedings, which are only such as are authorized by the statute, the statute must be strictly construed, and that all doubt must be resolved in favor of the person against whom the proceeding is instituted.

In *Smith v. Westerfield*, 88 Cal. 374, at 379, the court says:

“Jurisdiction of special proceedings is conferred by the Constitution upon the Superior Court, but inasmuch as special proceedings are only such as are created and authorized by statute, the court, in the exercise of its jurisdiction, is limited by the terms and conditions under which the proceedings were authorized.”

In *Fukumoto v. Marsh*, which was a case involving an order of arrest in a civil action, 130 Cal. 66, at 70, the court says:

“We think an affidavit resting wholly, or in any one essential particular, on information and belief,

without stating facts upon which such belief is founded, does not confer jurisdiction to issue the order. The statute must be complied with or there is no jurisdiction to issue the order. *In re Vinich*, 86 Cal. 70, 7 Am. & Eng. Ency. of Law, First Ed., 682, and cases cited.

"It was said in *Spice v. Steinrick*, 14 Ohio St. 213: 'It is clear, we think, that in the exercise of this special and extraordinary power conferred by the statute and interfering with the personal liberty of the defendant, *the course prescribed by the statute* must be strictly pursued.'" (The italics are ours.)

In the case of *Hathaway v. Johnson*, 39 N. Y. 93, 14 Am. Rep. 186, the court says:

"Statutes authorizing arrest and imprisonment for debt, although remedial in that they are designed to coerce, by reason of imprisonment, the payment of the creditor, are also regarded as penal, and ought not to be extended by construction so as to embrace cases not clearly within them."

In 3 Cyc., page 899, on the subject of "Arrest," we find the following language:

"Statutes authorizing the arrest and holding to bail of defendants in certain civil actions do not violate constitutional provisions forbidding deprivation of liberty without due process of law, the imposition of cruel and unusual punishment, or imprisonment for debt. Such statutes should, however, be strictly construed."

In the case of *Irvine v. McKeon*, 23 Cal. 472, which is a case involving the construction of a statute mak-

ing the directors of a corporation personally liable for the debts of the company in excess of its capital stock actually paid in, the court, at page 475, says:

“This statute provides for making one person individually liable for the debts of another, and prescribes how and under what circumstances he shall be held thus liable. Like other statutes which create a forfeiture or impose a penalty, it is to be strictly construed, and every intendment and presumption is in favor of the defendant in such cases. He is to be held liable only on full and strict proof of all the facts by the statute made essential to create the liability.”

We also cite to the same effect the following cases:

Trumpler v. Bemerly, 39 Cal. 490;

Ex parte Kohler, 74 Cal. 38.

The foregoing being the law governing the construction of statutes affecting the property of a defendant, which are penal in their nature, it follows that the rule is more forcible requiring the strict construction of statutes which involve the personal liberty of the defendant.

As was said by the court in *ex parte* Fkumoto, 120 Cal. 316, at 321, which was a case of arrest in a civil action:

“If this is so in cases not involving the liberty of a citizen, a *fortiori* is demanded in a proceeding such as this.”

**The Statute has not been Strictly Complied With and
Hence the Proceeding is Void.**

That statute has not been complied with.

First: For the reason that the affidavit which gives the court jurisdiction to issue the order of arrest does not show that a sufficient cause of action exists.

Second: For the reason that the affidavits are made upon information and belief and no facts are stated upon which the information and belief are founded. (Section 481 of Code of Civil Procedure of the state of California, above quoted.)

Third: The order of arrest was made prior to the issuance of summons in the said action, directly in violation of section 483 of the Code of Civil Procedure of the state of California, above quoted.

Affidavit Does Not Show That Cause of Action Exists.

The affidavit under which the order in this case was made does not show that a cause of action exists against the plaintiffs in error. The only reference to any cause of action pending or existing against the plaintiffs in error is the conclusion of the defendant in error at the beginning of the affidavit, "That she is the plaintiff above named." [Tr. p. 69, fol. 65.]

In the case of *McGilvery v. Morehead*, 2 Cal. 607, at 609, the court says:

"The act which allows a party to be arrested in a civil case requires the affidavit to disclose that a sufficient cause of action exists, and that the case is one of those for which the remedy of arrest is provided.

“It is well settled that the facts necessary to be shown, must appear by the positive averments of the affidavit, and it is insufficient to refer to the complaint or to any other paper to show what the affidavit ought itself to disclose, although it is positively averred that such complaint or paper is true.”

In *Fkumoto v. Marsh*, 130 Cal. 66, at 69, the court says:

“As the jurisdiction to issue the warrant rests upon the affidavit, it results, from what has been said, that the order of arrest was void, and the warrant is no authority for the prisoner’s detention. Respondent seems to be of the impression that jurisdiction is aided by the pendency of the action. It is necessary to the jurisdiction that an action be pending (Code of Civil Procedure, 480, 483), but as above stated, jurisdiction to make the order rests upon the affidavit.”

Again, at page 70, the court says:

“Where the judge has, in fact, no jurisdiction to act, his order of arrest is void, and whether he has jurisdiction must be determined from the affidavit itself, and not from what the judge thinks it authorizes him to do. The plaintiff must see to it that he is clothed with actual, not merely apparent, authority before he can deprive the defendant of his liberty.”

In *Peterson v. Nesbitt*, 11 Cal. App. 370, at 373, the court says:

“Jurisdiction to issue an order of arrest in a civil suit rests upon the affidavit. Where the affidavit in an essential particular fails to meet the

requirements of the law, the court is without jurisdiction to issue the order for arrest. (Citing *ex parte* Fkumoto, 120 Cal. 326, 52 Pac. 726; Neves v. Kosca, 5 Cal. App. 111, 89 Pac. 860.)”

Citing also the case of:

Lay v. Superior Court, 11 Cal. App. 558, and
Farrow v. Dutcher, 19 R. I. 715.

Hence, it will be observed that unless the affidavit shows that a cause of action existed against the plaintiffs in error, the order of arrest was made without authority and was void. The affidavit has no averment that the defendant in error has a cause of action against the plaintiffs in error, and taking the facts set out in the affidavit, it is insufficient to constitute a cause of action against the plaintiffs in error, or either of them. The affidavit is merely a series of conclusions of the affiant and hence does not show from the facts stated that a cause of action exists against the plaintiffs in error, or either of them, nor does said affidavit show that the judge who issued the order was the judge of the court in which the action is pending, or that any action was pending in any court.

Section 480 of the Code of Civil Procedure reads as follows:

“An order for the arrest of the defendant must be obtained from the judge of the court in which the action is brought.”

Hence, the affidavit is defective in not showing that a sufficient cause of action exists and that there is an action pending before the court of which the judge who signed the order was judge.

Affidavits are Insufficient for the Reason that they are Made upon Information and Belief.

Under section 481 of the Code of Civil Procedure of the state of California, above quoted, the affidavits for arrest in civil actions, if made upon information and belief, must state the facts upon which the information and belief are founded, and such affidavit must bring the action within one of the provisions mentioned in section 479, C. C. P., above quoted.

We submit that the affidavits in this case are wholly insufficient because made upon information and belief and no facts are stated upon which the information and belief are founded, and that the showing of the affidavit does not bring the case within one of the provisions of section 479, C. C. P., above quoted.

If said action is within section 479, C. C. P., at all, it must either come within subdivisions 1, 4 or 5, and could not possibly come under subdivisions 2 or 3 of said section.

The Affidavit is Insufficient to bring the Case under Sub-Division I of Section 479 of the Code of Civil Procedure.

The affidavit of the plaintiff, defendant in error here, shows that the defendants, plaintiffs in error here, are about to leave the state with intent to defraud creditors of Domestic Utilities Mfg. Co.; such allegation should be that the defendants below, plaintiffs in error here, were about to depart from the state with intent to defraud their creditors. The above allegation was made upon information and belief and the facts upon which she founds her information and belief are as

follows: That defendant E. R. Crooker has repeatedly stated within the past 60 days to persons in the city of Los Angeles, without naming them, that he intended to go to England to remain indefinitely; that she is informed by persons whom she believes to be reliable that defendant Edwin R. Crooker is hiding in the vicinity of Los Angeles; that defendants are preparing for immediate departure from the United States by steamer for Australia, with the intention of remaining permanently out of the United States, and that if they are not prevented from sailing she will lose all chance of securing redress.

This is made upon information and belief. The defendant also states that her information was gotten from a man who called her on the phone and told her that he would not give her his name or consent to the use of his name, but that she believed she knew who the person was who was speaking to her, but that she does not desire to disclose his name. That she had a conversation with a business man in the City of Los Angeles who has done business with the Domestic Utilities Manufacturing Company, who would not give her any information until she promised not to use his name. The affidavit does not disclose his name, nor does said man make any affidavit. That she has tried to get service on the defendants Edwin R. Crooker and Harry L. Crooker in December, 1913, in New York and Washington, D. C., and that she employed attorneys to prepare a suit against the Crookers in Washington, D. C.

There is no allegation in the affidavit, except the ones referred to above, with reference to the defendant

in error's information about the plaintiffs in error leaving the state. The court will note that such allegations as are stated are mere hearsay and cannot be construed as a statement of fact.

In the case of *ex parte* Fkumoto, 120 Cal. 316, at 319, the court says:

"It is quite apparent that these facts do not bring the case within either of the provisions of the statute relied on by respondent. Very clearly do they fall short of showing that 'defendant is about to depart from the state, with intent to defraud his creditors.' No such purpose or intent is expressly asserted, nor are facts stated from which such deduction may be made. 'That defendant will escape from the state' and thus 'defraud and cheat this plaintiff' is not the equivalent of the statutory requirements that he 'is about to depart from the state with intent to defraud his creditors.' Both the present purpose and the specific intent found in the language of the statute are wanting in that of the affidavit. When the language of such a statute is departed from, the party must, at his peril, employ words of equivalent import, and a failure in this respect is fatal. (Drake on Attachment, section 8; Jackson v. Burke, 4 Heisk 610.) Moreover, the statement that defendant 'will escape from the state,' etc., is the mere statement of the conclusion or belief of the affiant, and without a statement of the facts from which such conclusion is drawn or upon which the belief is founded is not evidence upon which the court is at liberty to act in such a case. (Burrichter v. Cline, 3 Wash. 135; Thompson v. Best, 21 N. Y. St. Rep. 105; 4 N. Y. Supp. 229.) 'Where in a civil action the plaintiff desires, so to speak, to enforce his claim

at the outset by arrest and imprisonment of the defendant; in other words, to have execution before obtaining judgment, it is not too much to ask him to present such evidence as alone would be receivable upon the trial of the action to justify an ordinary judgment for money.' (Markey v. Diamond, 20 N. Y. Supp. 847, 1 Misc. Rep. 97.)

* * * These and like statements, which need not be specifically referred to, are, as suggested above, too vague, general and indefinite from which to deduce that specific intent of fraudulent purpose which is the basic element upon which the right given by the statute rests, and which must be made clearly to appear before the remedy may be invoked. *It is not enough to assert such fraudulent intent in general terms.* Like the statement or proof of a cause of action for fraud, *the specific facts relied on must be shown*, that the court itself may deduce the fraud, and not leave the question of the sufficiency of his facts to be passed upon by the party. (Morris v. Talcott, 96 N. Y. 107.) If this is so in cases not involving the liberty of the citizen, *a fortiori* it is demanded in a proceeding such as this; otherwise, the party is constituted the arbiter of his own rights.

"There is another fatal defect common to the entire affidavit. Several of the statements of fact are made expressly upon information and belief, while many others, *although not so stated in terms, are of a character which could, in their nature, only have been so made*, whereas the facts upon which such information and belief are founded are in no instance given. In this the affidavit fails to comply with one of the express and most material requirements of the statute (Code of Civil Procedure, Sec. 481).

“As the jurisdiction to issue the warrant rests upon the affidavit, it results, from what has been said, that the order of arrest was void and the warrant is no authority for petitioner’s detention.” (The italics are ours.)

In *Fukumoto v. Marsh*, 130 Cal. 66, at 69 and 70, the court says:

“But the statute expressly requires that when the affidavit is upon information and belief ‘it must state the facts upon which the information and belief are founded.’ We cannot agree with respondent that it is but error to be corrected on appeal where facts are stated as was done in the affidavit before us. We think an affidavit resting wholly, *or in any one essential particular*, on information and belief, without stating the facts upon which such belief is founded, does not confer jurisdiction to issue the order. The statute must be complied with or there is no jurisdiction to issue the order. (*In re Vinich*, 86 Cal. 70, 7 Am. & Eng. Enc. of Law, First Ed. 682, and cases cited.) It was said in *Spice v. Steinruck*, 14 Ohio St. 213: ‘It is clear. we think, that in the exercise of this special and extraordinary power conferred by the statute and interfering with the personal liberty of defendant, the course prescribed by the statute must be strictly pursued.’” (The italics are ours.)

In *Neves v. Costa*, 5 Cal. App. 111, at 115, the court says:

“The affidavit must be either positive or upon information and belief, and when upon information and belief, it must *state the facts* upon which the information and belief are founded.

"In order that it may appear to the judge, it is necessary that the facts shall be stated by competent evidence, such as would justify the court in making a finding upon a trial. * * *

"While the affidavit may state generally the grounds of the application upon belief only, we understand the rule to be well settled that to show the grounds of his belief he must set forth such facts and circumstances *within his own knowledge* as will authorize the officer who is to issue the warrant to find such a state of facts as required by the statute to authorize the proceeding, and if the plaintiff is not himself personally cognizant of the facts and circumstances relied upon, he must procure the affidavit of someone who is thus personally cognizant of them. The warrant cannot be issued upon hearsay, nor upon any statement, however positive, founded upon hearsay. (Proctor v. Prout, 17 Mich. 475.)

"The affidavit contains no positive allegation of fraudulent intent, and the only statement of the debtor's intention to leave the state is that he told M. Macedo so. The latter statement is positive in form only. It is hearsay, pure and simple. * * *

"The affidavit seems wanting in the elements necessary to confer jurisdiction. There is neither positive averment of fraud nor positive evidence of facts from which fraud can be inferred. (Fkumoto v. Marsh, 130 Cal. 68.)" (The italics are ours.)

Therefore, it is clear to our minds that any allegation of the affidavit that "defendants are about to depart from the state with intent to defraud the creditors of the Domestic Utilities Manufacturing Co." are mere conclusions and hearsay and do not measure up to the requirements of the statute. We also call the court's

attention to the fact that the allegations of the affidavit are that the “defendants are about to leave the state for the purpose of defrauding the creditors of the Domestic Utilities Mfg. Co.,” which does not come within the statute, which provides that “the affidavit must show that he is about to depart from the state with intent to defraud *his* creditors,” and putting a strict construction on the statute, as we have heretofore seen should be done, the affidavit is wholly insufficient for the reason that it does not show that the plaintiffs in error were about to depart from the state for the purpose of defrauding *their* creditors.

The affidavit does not bring the case under subdivision 4 of section 479 of Code of Civil Procedure, above quoted, for the reason that the affidavit does not show that the defendant, plaintiffs in error here, were guilty of fraud in contracting the debt or incurring the obligation for which the action is brought. We have seen that allegations in an affidavit, if made upon information and belief, must state the facts upon which the information and belief are founded. The general allegations that the plaintiffs in error were guilty of fraud are not sufficient. There is no fact set out in the affidavit, but the affidavit merely contains conclusion of the affiant that the plaintiffs in error were guilty of fraud in contracting the debt and could not be considered by the court as positive allegations of fact. The affidavits show that certain circulars were distributed and that the defendant saw said circulars and read them, but do not set out what the circulars contained, and the court could not determine whether there was any misrepresentation or fraudulent matter in said cir-

culars or not; hence such allegations are mere conclusions of the affiant. The affidavit also contains an allegation that the plaintiffs in error conspired to cheat and swindle the defendant by means of said circulars and contract, without specifying any misrepresentations or fraudulent pretenses relied upon by the affiant. There are also many allegations in the affidavit showing that the plaintiffs in error, after the entering into said agreements with the defendant in error, failed to carry out their agreements with her, but such failure on the part of the plaintiffs in error were not fraudulent and were not representations upon which she relied when she entered into the contract, they are mere breaches of contract for failure to deliver washers purchased by her. From a careful reading of the affidavit the court will see that there is no allegation of fraud that would come within subdivision 4 of section 479 of the Code of Civil Procedure, namely: fraud in contracting the debt and incurring the obligation.

In this regard we cite the court in the case of *Thorpe v. Waddingham*, 3 Dalys (N. Y.) 275:

“It is well settled in practice that where fraud is alleged as the basis of an arrest, the particular facts constituting the fraud should be set forth, to enable the court to pass judicially upon the question. A general allegation that a party has been guilty of fraud is the statement of a conclusion, which may or may not be correct.

“In the case of fraudulent representations by which a party is subject to arrest it must appear not only that the same were false, but that they were known to be such at the time they were made.”

In *Draper v. Beers*, 17 Abb. Pr. (N. Y.) 163, the court says:

“The affidavit to authorize an order of arrest for fraudulent representations, whereby the defendant procured the sale and delivery of personal property, must not only set forth the particular statements or representations made in order to obtain the property, but must also set forth in what respects they are false. A general allegation that the representations made are false and fraudulent is not sufficient.”

If we view the affidavit in this case in the light of the foregoing opinions it will readily be seen that they are insufficient to authorize the order of arrest. An arrest is only authorized by section 479 of the Code of Civil Procedure of the state of California and not otherwise.

The affidavits do not bring the case within subdivision 5 of section 479 of the Code of Civil Procedure, namely: that the defendant is about to remove or dispose of his property with intent to defraud *his* creditors. The affidavit contains no allegations of any fact showing that the plaintiffs in error, or either of them, were about to remove their property to defraud their creditors; such allegations, whatever they are, are made upon information and belief of the affiant and are wholly insufficient to justify the issuance of an order upon this ground.

In the case of *Moller v. Azuar*, 11 Abb. Pr. (N. S.) 233, which was a case in which an order of arrest had been issued upon this ground, the court says:

“There is no specification of any such property, and the general allegation of the plaintiff's belief of defendant's intent to remove or dispose of any such property, without pointing to the specific property or circumstances upon which such belief was predicated, is clearly insufficient to uphold an order of arrest. The fact of his having so removed or disposed of his property or of his intent so to do must be presented by some evidence tending to that conclusion. It is not sufficient to sustain the order of arrest that plaintiff have some vague belief of such fact.”

So, in the case at bar, the most that can be said from the affidavits is that the defendant in error has some vague belief that the plaintiffs in error have at some time had some property, and that she thinks they have secreted it, but the allegations are so vague and indefinite as to be clearly insufficient to sustain an order of arrest. There is no allegation that any attempt has ever been made to find any property belonging to the defendant, the only allegation being that search has been made among the public records of Los Angeles, California.

Order of Arrest was Irregularly and Prematurely Issued and is Therefore Void.

Under section 483 of the Code of Civil Procedure of the state of California, above quoted, an order of arrest can only be made at the time of the issuance of summons, or at any time *afterwards* before judgment. The record in this case shows that the summons was issued one day after the issuance of the order of arrest.

The defendant in error, if she pursues the drastic

remedy of arresting the plaintiffs in error must, at her peril, strictly follow the statute. (See cases above cited.)

The Record upon its Face, upon which the Court Acted When it Issued the Order of Arrest, Showed Affirmatively that the Court had no Jurisdiction of the Parties or Subject Matters.

We have contended heretofore in this brief, and cited cases to that effect, that the court can only look to the affidavit in making an order of arrest under the statutes of the state of California, but the court, upon hearing this motion, assumed and ruled that he had the right to look to the complaint, and, therefore, without conceding the fact that he had such a right, we will argue the sufficiency of the record, considering the affidavit and the complaint, at the time of the making of the order of arrest.

The complaint on its face showed that the court was without any jurisdiction of the parties or the subject matter, for the reason that it affirmatively appeared from the complaint that the plaintiff therein, defendant in error here, was a citizen of the District of Columbia. It will not be necessary to cite numerous authorities to show that this allegation was insufficient to confer jurisdiction upon the court, and we will content ourselves with citing two cases as this contention is virtually conceded by the defendant in error.

The cases upon this point are:

Hooey v. Jamieson, 166 U. S. 398;

Hepburn v. Ellzey, 2 Cranch. 445.

Defendant in error contended at the hearing of said motion, and the court so held, that the court could, upon this motion, look to the amendment to the complaint to sustain its jurisdiction to make the order. The order in this case, as was shown in the statement of fact, was made on the 26th day of January, 1915, and the amendment to the complaint was filed on the 23rd day of February, 1915, nearly a month after the order of arrest was made and after the arrest and admission to bail of all of plaintiffs in error. Unfortunately for the plaintiffs' contention, the law as laid down and repeatedly stated by the Supreme Court of the United States is that the federal courts are courts of limited jurisdiction and there is no presumption in favor of their jurisdiction, but the presumption is that they have no jurisdiction, and that facts conferring jurisdiction *must affirmatively appear from the record upon which the court is called to act.*

The case of Mansfield C. & L. M. Railway Co. v. Swan, 111 U. S. 379, is one of the leading cases upon this subject, and the court in that case, at pages 381, 382 and 383 of the opinion, uses the following language:

"It appears from the petition for removal, and not otherwise by the record elsewhere, that at the time the action was first brought in the state court one of the plaintiffs and a necessary party, McMann, was a citizen of Ohio, the same state of which the defendants were citizens. It does not *affirmatively* appear that at the time of the removal he was a citizen of any other state. The averment is that he was not then a citizen of Ohio, and that his actual citizenship was unknown, except that

he was a citizen of one of the states or territories. It is consistent with this statement, that he was not a citizen of any state. He may have been a citizen of a territory, and if so, the requisite citizenship would not exist. (*New Orleans v. Winner*, 1 Wheat. 91.)

“According to the decision in *Gibson v. Bruce*, 108 U. S. 561, the difference of citizenship on which the right of removal depends must have existed at the time when the suit was begun, as well as at the time of the removal, and according to the uniform decisions of this court, the jurisdiction of the Circuit Court fails unless the necessary citizenship affirmatively appears from the pleadings or elsewhere in the record. *Grace v. American Central Ins. Co.*, 109 U. S. 278, 283; *Robertson v. Cease*, 97 U. S. 646.

“It was error, therefore, in the Circuit Court to assume jurisdiction in the case, and not to remand it on the motion of the plaintiffs below.

“It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it, and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it, but the rule springing from the nature and limits of the judicial power of the United States *is inflexible and without exception* which requires this court, of its own motion, to deny its own jurisdiction and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not *affirmatively appear in the record on which, in the exercise of that power, it is called to act.* * * * And in the most recent utterance of this court upon the point, in *Bors v. Preston*, *ante* 252, it was said by

Mr. Justice Harlan: 'In cases of which the Circuit Court may take cognizance only by reason of the citizenship of the parties, this court, as its decisions indicate, has, except under special circumstances, declined to express any opinion upon the merits on appeal or writ of error, where the record does not affirmatively show jurisdiction in the court below. This because the courts of the Union, being courts of limited jurisdiction, *the presumption in every stage of the cause is that it is without their jurisdiction unless the contrary appears from the record.*'

"The reason of the rule and the necessity of its application are stronger and more obvious when, as in the present case, the failure of the jurisdiction of the Circuit Court arises, not merely because the record omits the averment necessary to its existence, *but because it recites facts which contradict it.*" (The italics are ours.)

So, in the case at bar, the record upon which the court was called to act and upon which it did act in issuing the order of arrest shows affirmatively, upon its face, that the courts of the United States were without jurisdiction in the case, for at that time the affirmative allegation in the complaint was that the plaintiff was a citizen of the District of Columbia.

See also *Bors v. Preston*, 111 U. S. 252, quoted in the above opinion.

In the case of *Drake v. American Central Ins. Co.*, 109 U. S. 278, at 283, the court says:

"The record in this case presents a question of jurisdiction which, although not raised by either party in the court below or in this court, we do

not feel at liberty to pass without notice. *Sullivan v. Fulton Steamboat Co.*, 6 Wheat. 450; *Jackson v. Ashton*, 8 Pet. 148. As the jurisdiction of the Circuit Court is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, *the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appear.* *Turner v. Bank of North America*, 4 Dall. 8; *Ex parte Smith*, 94 U. S. 455; *Roberts v. Cease*, 97 U. S. 646.” (The italics are ours.)

Again in the case of *King Vridge Co. v. Otoe County*, 120 U. S. 225, the court says:

“This case was argued upon the question of limitation, but we have no occasion to consider that question, for it does not appear that the Circuit Court had jurisdiction in the action. Unless the contrary appears *affirmatively* from the record, the presumption upon writ of error or appeal *is that the court below was without jurisdiction.* (Citing cases.)

“That the point as to jurisdiction was not made here by either party is immaterial because, as said in *Mansfield etc. Railway Co. v. Swan*, 112 U. S. 379, at 382, ‘The rule springing from the nature and limits of the judicial power of the United States is inflexible and without exception which requires this court, of its own motion, to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not *affirmatively appear in the record on which, in the exercise of that power, it is called to act.*’” (The italics are ours.)

In *Parker v. Ormsby*, 141 U. S. 81, at 83, the court says:

“Did the court below have jurisdiction of this case? If jurisdiction did not affirmatively appear upon the record it was error to have rendered a decree, whether the question of jurisdiction was raised or not in the court below. In the exercise of its power this court, of its own motion, must deny the jurisdiction of the courts of the United States in all cases coming before it, upon writ of error or appeal, *where such jurisdiction does not affirmatively appear in the record on which it is called to act.*”

Many other cases might be cited to the effect that the jurisdiction of the courts of the United States must affirmatively appear in the record on which the court is called to act.

The Court could not Look to the Amendment to the Complaint in Aid of its Jurisdiction upon the Hearing of the Motion to Vacate the Order of Arrest.

The Code of Civil Procedure, section 503, one of the sections dealing with these proceedings, provides:

“* * * If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.”

In this case the application is not made upon affidavits on behalf of the plaintiffs in error and therefore under the express provision of the code governing the application to vacate the order of arrest, the defendant in error is not to be allowed to oppose the motion of

plaintiffs in error with any documents whatsoever other than those on which the order of arrest was made. Clearly, the wording of this section is so broad and comprehensive as to eliminate any question of the right of the defendant in error to rely upon an amendment to her complaint to support the order of arrest.

The question of the right of the defendant in error to amend the papers upon which the order of arrest is based, in proceedings of this character, has also been directly passed upon in Rhode Island and New York, both of which states have statutes governing this proceeding practically the same as the statutes of California.

In *So. Navigation Co. v. Sherwin*, 1 N. Y. Civ. Proc. Rep. 44, it was said:

“The order of arrest in this case was granted, as appears by the recitals in the order, upon the summons and complaint and the affidavits of William K. Gleason and William B. Hornblower. Section 558 of the Code of Civil Procedure, as amended in 1879, provides:

“‘But at any time after the filing or service of the complaint the order of arrest must be vacated, on motion, if the complaint fails to set forth a sufficient cause of action, as required by the last section,’ i. e., section 557. The complaint which was served upon the defendant, with the summons and affidavits, fails to set forth any cause of action whatever in favor of the plaintiff, against the defendant. It, therefore, follows that this motion must be granted, unless the amended complaint, which has been served on the part of the plaintiff, can be resorted to uphold the order of arrest, by granting the plaintiff’s motion that such

complaint be declared amended *nunc pro tunc*, as of the date of the service of the original complaint. (See *Hecht v. Levy*, 20 Hun. 53; *Easton v. Cassidy*, 21 Id. 460.)

"I am of the opinion that the motion of the plaintiff should not be granted, for the purpose of upholding the order of arrest. The issuing of an order of arrest is not a matter of course, and it is the duty of the plaintiff who invokes the aid of the court in obtaining such an order to see that he has complied with all the requirements of the law applicable thereto. In the case of *Donnell v. Williams*, 21 Hun. 216, it was held that the failure to state in an affidavit upon which an application for attachment is made that the plaintiff is entitled to recover the sum mentioned therein, over and above all counter-claims known to him, as required by section 636 of the code, renders the attachment void *ab initio*, and in *Blossom v. Estes*, 22 Hun. 472, the court, at general term, say: 'It has been repeatedly held that an attachment is invalidated by the failure to serve or publish the summons within thirty days after the issuing of the warrant. The court may, of course, acquire jurisdiction and proceed with the action, *in personam*, upon the service of a summons or the defendant's voluntary appearance of a later date. But the provisional remedy fails unless the service is effected or the publication commenced within the time prescribed by statute. * * * This was not a mere irregularity, but a jurisdictional omission, which invoked the destruction of the warrant.'

"The reason in these cases seems to me to apply with peculiar force to this case. The liberty of the citizen is of quite as much importance as the preservation or security of his property. If the

provisions of the code are to be strictly construed in cases of attachment, the same rule of construction should be applied to the provisions which relate to the obtaining of orders of arrest.

“Again, this motion is made under section 568, on the plaintiff’s own papers, and must be heard, as that section declares, upon those papers only. To allow the plaintiff to introduce an amended complaint on this motion would be allowing him to refer to other papers than those on which the order was granted, and in violation of that section.”

So in the case at bar, as above stated, we are making this motion under section 503, upon the papers on which the order of arrest was made, and under that section and under the above case, no other papers can be considered. Certainly, in this action the plaintiff is no more entitled to have an amendment to his complaint considered, which seeks to correct an admittedly fatal jurisdictional allegation in the original complaint, than the plaintiff in the New York case was to amend his complaint so that it would state a cause of action. Especially is this rule applicable to cases in the United States courts, in which courts, as shown by the cases heretofore cited, there is no presumption in favor of their jurisdiction, but, on the contrary, the presumption is that the court is without jurisdiction until the contrary affirmatively appears from the *record upon which the court is called to act*.

In the case of *Farrow v. Dutcher*, 19 R. I. 715, at 716, which was also a case involving the validity of an order of arrest in a civil action, the court says:

“We are of the opinion that the District Court of the Fourth Judicial District erred in permitting the affidavit on the back of the writ, which is a condition precedent to the service of the writ by arrest, to be amended by the insertion of the words, after the word ‘claim,’ ‘that is due.’ The plaintiffs contend that the insertion of these words did not materially alter the meaning of the affidavit, but that they were implied in the statement that the plaintiff has ‘a claim on which he expects to recover in the action.’ We do not assent to this argument. The framers of the statute, for good reason, no doubt, saw fit to require, in addition to the other statements, the statement that the claim is due, and we see no reason for dispensing with the allegation. As the affidavit is the foundation on which the right to arrest is based, it must be strictly complied with, or the arrest is unlawful. *Spice v. Steinruck*, 14 Ohio St. 213, 219; *Whiting v. Trafton*, 16 Me. 398; *Probate Court of Hopkinton v. Lanthear*, 14 R. I. 291.”

The foregoing authorities seem to dispose conclusively of plaintiff's contention that the amendment to the complaint can be considered on this motion, and as admittedly the complaint in this action, at the time the order of arrest was made, showed affirmatively on its face that the court was without jurisdiction, it follows that the order of arrest is void and must be vacated.

Furthermore, the amendment to the complaint, even though it could be considered on this motion, which, as above shown, cannot be done, is insufficient to confer jurisdiction upon the court in this action. The allegation in the amendment to the complaint is that the

plaintiff "is a citizen of the state of Alabama." [Tr. p. 142, fol. 131.] The amendment was sworn to on the 23rd day of February, 1915. Counsel, in his argument at the time of the hearing of this motion, says that this carries the allegation back to the commencement of the action and is equivalent to an allegation that the plaintiff was at the commencement of the action, on the 26th day of January, 1915, a citizen of the state of Alabama, and cites a case in 5 Blatchford 251, in support of his position. A careful reading of this case, however, shows that it does not support his contention. That was a case in which the trial was had upon an amended declaration, and there is nothing to show that there was any conflict upon the jurisdictional averment of citizenship between the amended declaration and the original declaration in the action. In the case at bar, however, the original complaint affirmatively alleges citizenship in the District of Columbia, which would not confer jurisdiction upon this court. A month later the plaintiff swears to and files an amendment to her complaint, alleging that she is at that time a citizen of Alabama. This does not overcome the defective allegation in the original complaint and does not confer jurisdiction upon this court. It may well be that on February 23rd the plaintiff was a citizen of Alabama, and yet she may also, on January 26th, have been a citizen of the District of Columbia, and in fact, the pleadings, as they now stand, raise a presumption that this is the case, and such a state of facts would not confer jurisdiction upon the court, for the necessary diversity of citizenship must exist at the commencement of the action, and the necessary allegations of

citizenship must be distinctly and clearly made by the averments in the pleadings and the question must not be left to be inferred argumentatively therefrom.

Anderson v. Watt, 138 U. S. 694, at 702;

Brown v. Keene, 8 Pet. 112.

Counsel for defendant in error at the time of the hearing of this motion advanced the novel argument that the allegation in the original complaint that the plaintiff in the court below was a citizen of the District of Columbia does not confer jurisdiction upon this court and is the same as though no allegation of citizenship whatever had been made, and that therefore there is no conflict between that allegation and the allegation of citizenship in the amendment to the complaint, and that the allegation in the amendment to the complaint therefore refers back to the time of the commencement of the action.

This proposition cannot be sustained upon its face. Counsel would have us to believe that a citizen of the District of Columbia has no citizenship whatever, and is not a citizen but the Supreme Court has said otherwise.

In the case of *Prentiss v. Brennan*, 2 Blatchford (U. S.) 162, 19 Fed. Cases No. 11,385, the court says:

“A person may be a citizen of the United States and not a citizen of any particular state. This is the condition of citizens residing in the District of Columbia and in the territories of the United States, or who have taken up a residence abroad, and others which might be mentioned. A fixed and permanent residence or domicile in a state is

essential to the character of citizenship that will bring the case within the jurisdiction of the federal courts, as will appear from the cases already referred to.”

In conclusion we contend:

First: That the court did not have jurisdiction of the parties or the subject matter, and therefore the order of arrest was void.

Second: That the statute has not been complied with and hence the motion to vacate the order of arrest should have been granted.

Third: That the affidavits upon which such an order can be made, under the laws of California, made upon information and belief, were not sufficient to bring the case under section 479 of the Code of Civil Procedure, or any subdivision thereof, and that the arrest of the plaintiffs in error was unlawful and the motion to vacate such order should have been granted.

It appears to us where the personal liberty of parties is at stake that it is not requiring too much of a plaintiff that he conform strictly with the provisions of the statute and that the affidavit upon which such liberty of a defendant is taken away should state facts and not conclusions of law and hearsay evidence, as has been said in many cases of this character.

We respectfully submit that the order denying plaintiffs in error's motion to vacate the order of arrest should be reversed.

R. W. KEMP and
DAVIS, KEMP & POST,
Attorneys for Plaintiffs in Error.

3
No. 2704.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Edwin R. Crooker, Louise E.
Crooker, W. P. Ellis and F. W.
Sterling,

Plaintiffs in Error,

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Filed

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F. D. Monckton,
Clerk

**BRIEF IN OPPOSITION TO MOTION TO DISMISS
WRIT OF ERROR.**

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BRIEF IN OPPOSITION TO MOTION TO DISMISS
WRIT OF ERROR.

Defendant's motion to dismiss the writ of error in this case is based upon the ground that the order appealed from is not a final order. We contend that the order appealed from is a final order and that the writ of error will lie to review the action of the District Court.

In the case of *Stroheim et al. v. Deimel et al.*, 77 Fed. Rep., p. 802, which was a civil action instituted under the statute of the state of Illinois, similar to the California statute, wherein the defendant in that action

was arrested and was, on motion, discharged from custody, the court said, at page 805:

“If the proceedings in the Circuit Court had been by *audita querela*, in accordance, it would seem, with the better practice, a right to a writ of error would have been beyond question. As made upon motion the order of discharge was no less final in its character and effect.”

While it is the general rule that the whole controversy must be settled between the parties before a writ of error will lie, still there are numerous exceptions to the rule and we contend that the present case is one of the exceptions, and that in all cases it is not necessary that the whole controversy between the parties be settled before an appeal or writ of error will lie. It depends wholly upon the nature of the order or judgment made as to whether or not it is final.

In the case of *Hove v. McDonald*, 109 U. S. 150, the court said, at page 155:

“The first matter to be determined is the motion on the part of the receiver to dismiss the appeal for the reason that he was not a party to the suit. This motion would not prevail. The proceedings instituted by order requiring the receiver to file his account and the subsequent reference to that account to an auditor, and the exception thereto, were all directed against the receiver for the purpose of rendering him personally responsible for the fund which had been placed in his hands, and which he had delivered over in obedience to the original decree. It was a *side issue* in the cause in which the complainant on the one side and the receiver on the other were real and interested

parties. The decree confirming the auditor's report was, as to this matter, a final decree against the complainants and in favor of this receiver. We have so often considered cases of this sort arising incidentally in a cause, but presenting independent issues to be determined between the parties to them, that it is unnecessary to enter a detailed discussion of the subject at this time."

So in the case of *Trustees v. Greenough*, 105 U. S. 527, the court at page 531 says:

"The first question, however, is whether these orders do or do not amount to a final decree upon which an appeal lies to this court. They are certainly a final determination of the particular matters arising upon the complainant's petition for allowance and direct the payment of money out of the fund in the hands of the receiver, *though incidentally to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision.* The distribution of the fund for the benefit of the bond holders may continue in the court for a long time to come, dividends being made from time to time and payment of coupons still unsatisfied. The case is a peculiar one, it is true, but under all the circumstances, we think the proceedings may be regarded as so far independent as to make the decision a final decree for the purpose of an appeal."

In the case of *City of Los Angeles v. Los Angeles City Water Company*, 134 Cal. 121, which is an appeal from an order settling the accounts of a receiver, the court says, at page 123:

"That any party aggrieved by such order may appeal to this court therefrom is, however, well

settled. (Estate of Welch, 106 Cal. 427.) In Grant v. Superior Court, 106 Cal. 324, this court refused to prohibit the Superior Court from making an order fixing the compensation of a receiver, giving as a reason therefor that if the court should order it to be paid out of the fund in the receiver's hands, 'such order, under whatever name it might be designated, would be a final judgment upon a collateral matter arising out of the action, and would be appealable by any party interested in the fund,' and that as an appeal could be taken from such order, a writ of prohibition would not lie. 'This was a clear declaration that the order was appealable, although the time within which the appeal might be taken was not then before the court. (Citing Hove v. McDonald, 109 U. S. 150, *supra*.)'

The District Court of the state of California, in the case of German-American Bank v. Frank L. Eastman *et al.*, filed on December 21st, 1915, and reported in the advanced sheets of the California Decisions, vol. . . . ; in this case the respondents moved to dismiss the appeal upon the ground that the appeal was not taken from the final judgment. The court says:

"There are apparent exceptions to the rule relied upon by respondents herein, but they arise out of incidental or separate proceedings calling for orders of the court which are in the nature of judgments, but which are not part of the main controversy. Thus it has been held that an order requiring a party to pay the receiver of an insolvent corporation money held by it as agent of the insolvent at the time of the adjudication of insolvency, is an order from which an appeal may be taken. The court said: 'The theory upon which

the decision sustains such right of appeal by such a party from such an order, is that the order is in effect a final judgment against him in a collateral proceeding growing out of the action—is so far independent of the suit itself as to be substantially a final decree for the purpose of an appeal, although there has been no final decree in the suit. (Anglo Cal. Bank v. Superior Court, 153 Cal. 753.)

* * * Another exception to the general rule is found in those cases where orders have been made refusing to allow the filing of a complaint in intervention, or judgment of dismissal has been entered against the intervenors after an order sustaining a demurrer to their complaint. It has been held that no reason exists requiring the party claiming the right of intervention to await judgment between the original parties to the litigation, and therefore that he should be allowed an immediate appeal. The order or judgment was considered to be final within the meaning of that provision of the code which allows an appeal from a final judgment. (Citing cases.)”

In the case of Anglo California Bank v. Superior Court, 153 Cal., page 753, the court says, at page 755:

“We can see no good answer to the claim made by defendants in their brief to the effect that plaintiff had the right to appeal from the order complained of, and therefore the writ of review was improperly issued. It is, of course, not disputed that if a party has the right of appeal from an order made in excess of jurisdiction, he cannot have such order reviewed in *certiorari* proceedings. Such is the express provision of our statute (Code Civ. Proc., sec. 1068), and it has been uniformly so held by this court. That an order of

the character of the one under consideration is generally appealable by one affected thereby who is a party to the record is practically conceded by learned counsel for plaintiff, and it must be under the decisions of this court. The theory upon which the decisions sustain such right of appeal by such a party from such an order is that the order is in effect a final judgment against him in a collateral proceeding growing out of the action—is so far independent of the suit itself as to be substantially a final decree for the purposes of an appeal, although there has been no final decree in the suit.”

In *Grant v. Los Angeles etc. Ry. Co.*, 116 Cal., page 71, at page 72 the court said:

“As to the order fixing the receiver’s compensation, while not nominally one from which the statute authorizes a direct appeal, and while it sufficiently appears that it is not a special order made after final judgment, it is, nevertheless, an adjudication from which an appeal will lie. The order not only fixes compensation of the receiver, but taxes such compensation as costs in the action as against all parties, and directs and authorizes the receiver to apply towards its payment the balance of the fund remaining in his hands as such receiver. Such an order, however it may be designated, is in legal effect a final judgment upon a collateral matter arising out of the action and is appealable by any party interested in the fund.”

So we contend that the order in the case at bar was a final determination of a collateral matter arising in the cause and the action of the court was a final determination of the rights of the plaintiffs in error. It was a proceeding collateral to the main issue in the

case and one that affected the rights of the parties, and the decision of the District Court was a final determination of the matters before the court, and unless reviewed by the Appellate Court and if allowed to become a final judgment, or until the final determination of the action, would be conclusive upon the plaintiffs in error and *res adjudicata* as to the matters decided therein. This proceeding could not be reviewed upon appeal from the final decree in the action, but would be *res adjudicata* as to the matters decided therein, and hence it necessarily follows that such order of the court was a final determination of the issues between the parties upon this collateral matter and is in effect a final judgment.

Respectfully submitted,

R. W. KEMP and

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Attorneys for Plaintiffs in Error.

4
No. 2704.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Edwin R. Crooker, Louise E.
Crooker, W. P. Ellis and F. W.
Sterling,

Plaintiffs in Error,

vs.

Elizabeth Knudsen,

Defendant in Error.

Filed

FEB 8 - 1905

F. D. Mancini,
Clerk.

BRIEF OF DEFENDANT IN ERROR.

ROBERT L. HUBBARD,
Attorney for Defendant in Error.

United States
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**Brief of Defendant in Error Elizabeth Knudsen upon Writ
of Error.**

First, in response to the first, fifth, ninth and thirteenth assignments of error, they being identical, but set forth separately for different plaintiffs in error, defendant in error contends:

I. That the United States District Court for the Southern District of California, Southern Division, had jurisdiction of the persons of the defendants and of the subject matter of said action.

(a) Because the necessary diversity of citizenship of the adverse parties *actually existed* at the date of the commencement of the action.

See affidavit of Elizabeth Knudsen in support of motion to amend her complaint [p. 135, Tr. of Rec.]; affidavit of Robert L. Hubbard in support of motion for leave to amend complaint [p. 138, Tr. of Rec.], and amendment to complaint [p. 142, Tr. of Rec.]. The *actual existence* of these jurisdictional facts at the time of filing original complaint was sufficient to give the court jurisdiction to make the order, notwithstanding such jurisdictional facts were not pleaded, or were pleaded improperly, and notwithstanding facts were pleaded which affirmatively, but erroneously, showed that the court had not jurisdiction, and the following authorities support that jurisdiction, this faulty allegation of citizenship being discovered by plaintiff and corrected by amendment, upon leave of court, before any of the defendants had filed any plea, demurrer, answer or other response whatever to the complaint, and while the court still had control of the record.

Mexican Central Railway Company v. Duthie, 189 U. S. 76, 47 L. ed. 715, at page 716:

“Duthie brought suit for the recovery of damages for personal injuries in the circuit court of the United States for the western district of Texas against the Mexican Central Railway Company, Limited, and in his original complaint averred that he ‘resides in El Paso, in El Paso county, state of Texas, in the western district of said state,’ and that defendant was a citizen of the state of Massachusetts. The cause was tried before a jury, and resulted in a verdict and judgment thereon April 10, 1902. The record shows ‘that no further proceedings were had in said cause after the entry of said judgment until, to-wit, the 17th day of April, 1902, on which day plaintiff filed his motion ask-

ing leave to amend his petition,' to the effect 'that leave be granted him to now amend his said original and first amended petition by inserting therein the following: 'And is a citizen of said state and of the United States of America,' after the allegation made in said pleading 'that plaintiff resides in El Paso, in El Paso county, state of Texas.' In support of the motion plaintiff stated under oath 'that he is now and was at the date of the filing of his original petition herein, and was on the 22d day of July, 1901, the date of his injuries, a *bona fide* citizen of the United States of America and of the state of Texas.' The court granted leave to so amend, and defendant excepted. Thereupon defendant applied to the court to certify to this court the question of jurisdiction to amend, *and to retain the judgment after such amendment*, and a certificate was accordingly granted.

"If the complaint or petition had remained as it was originally framed, and the case had then been carried to the Circuit Court of Appeals, that court would have been constrained to reverse the judgment and remand the cause for a new trial, *with leave to amend*. Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Horne v. George H. Hammond Co., 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167.

"But plaintiff, discovering the defect in the averment before the case had passed from the jurisdiction of the circuit court, applied and obtained leave to amend, and made the amendment. So that the only question is whether the circuit court had power to allow the amendment.

"By paragraph 954 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 697) it was provided that the trial court might 'at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe;' *and since the trial court in the present case*

still had control of the record, it had jurisdiction to act, and we may add that we do not perceive that there was any abuse of discretion in permitting the amendment in the circumstances disclosed. Mexican C. R. Co. v. Pinkney, 149 U. S. 201, 37 L. ed. 702, 13 Sup. Ct. Rep. 859; The Tremolo Patent, 23 Wall. 518, *sub nom.*; Tremaine v. Hitchcock, 23 L. ed. 97.

"If the statutes of Texas forbade such an amendment, the law of the United States must govern. Phelps v. Oaks, 117 U. S. 236, 29 L. ed. 888, 6 Sup. Ct. Rep. 714; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44."

Howard v. De Cordova, 177 U. S. 614, 44 L. ed. 910.

Continental Life Insurance Company of Hartford v. Rhoads, 119 U. S. 239, 30 L. ed. 380:

"If the plaintiff was actually a citizen of Pennsylvania when the suit was begun, the record cannot be amended here so as to show that fact, but the court below may, in its discretion, allow it to be done when the case gets back. Morgan's Exr. v. Gay, 19 Wall. 81 (86 U. S. bk. 22, L. ed. 100); Robertson v. Cease, *supra*."

Everhart v. Huntsville Female College *et al.*, 120 U. S. 224, 30 L. ed. 623:

"If on the return of the case to the circuit court it is made to appear that the citizenship necessary for the jurisdiction existed at the time the suit was brought, it will be for that court to determine whether an amendment of the pleadings ought to be allowed, so as to cure the present defects."

Menard v. Goggan, 121 U. S. 253, 30 L. ed. 914:

"If the necessary citizenship actually existed at the time the suit was begun, it will be for the court below

to determine, when the case gets back, whether the record shall be amended so as to show that fact, and thus make out the jurisdiction."

Eberly v. Moore, 65 U. S. 157, 16 L. ed. 612, at page 614:

"The plaintiffs object to the authority of the district court to permit the withdrawal of pleas in bar, for the purpose of pleading to the jurisdiction; that a plea in bar admits the jurisdiction of the court, and the capacity of the plaintiffs to sue, and that they cannot be deprived of the benefit of that admission. *The equitable jurisdiction of the courts of the United States as courts of law is chiefly exercised in the amendment of pleadings and proceedings in the court, and in the supervision of all the various steps in a cause, so that the rules and practice of the court shall be so administered and enforced as to prevent hardship and injustice, and that the merits of the cause may be fairly tried.* Such a jurisdiction is essential to and is inherent in the organization of courts of justice."

Kennedy *et al.* v. Bank of the State of Georgia *et al.*, 49 U. S. 610, 12 L. ed. 1209, at pages 1218 and 1219:

"The *injunction* was issued at the instance of Shultz, and for his benefit, and no question of jurisdiction was raised, *but as there was no allegation in the original bill of citizenship of the stockholders of the Bank of Georgia, it is supposed the proceedings were coram non judice.*

"Over the subject matter of the suit and of the parties, the court had jurisdiction, and the amendment corrected an inadvertence, *by stating the facts of citizenship truly.*

"But if no amendment had been made, would the orders and decrees in the case by the Circuit Court

have been nullities? That they have been erroneous, and liable to be reversed, is admitted. In *Skillern's Ex'rs v. May's Ex'rs* (6 Cranch. 267) a final decree had been pronounced, and by writ of error removed to the Supreme Court, who reversed the decree, and after the cause was sent back to the Circuit Court, it was *discovered to be a cause not within the jurisdiction of the court*; but a question arose whether in that court it could be dismissed for want of jurisdiction after the Supreme Court had acted thereon. The opinion of the judges being opposed on that question, it was certified to the Supreme Court for their decision. And this court held 'that the Circuit Court was bound to carry the decree into execution, although the jurisdiction of that court be not alleged in the pleadings.'

"The judgments of inferior courts, technically so called, are disregarded, unless their jurisdiction is shown. But this is not the character of the Circuit Courts of the United States. In Kempe's Lessee v. Kennedy (5 Cranch. 185) this court say: 'The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded.

"And again in the case of McCormick v. Sullivan (10 Wheat. 199), in answer to the argument that the proceedings were void, where the jurisdiction of the court was not shown, the court say the argument 'proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction, but they are not, on that account, inferior courts, in the technical sense of those words, whose judgment, taken alone, are to be disregarded. If the jurisdiction be not alleged in

the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities.'

"From these authorities, it is clear that the proceedings in the original case *are not void for want of an allegation of citizenship of the stockholders of the bank. They were erroneous, and, had no amendment been made, might have been reversed*, within five years from the final decree, by an appeal or a bill of review. But the mandate of this court which contained the amendment, *as to the citizenship of the stockholders of the bank*, agreed to by the counsel, was filed on the 6th of May, 1830, in the Circuit Court, and it necessarily became a part of the record of that court. *This was before the final decree was entered, and it removed the objection to the jurisdiction of the court. After this, the decree could not have been reversed for want of jurisdiction.* In the case of *Bradstreet v. Thomas* (12 Peters 64) the court held that an averment of citizenship in a joinder in demurrer, not being objected to at the time, was sufficient to give jurisdiction."

The court will observe that this was a case in which an injunction issued at a time when the jurisdictional fact was entirely wanting, and by a reading of the entire case it will be observed that the lapse of two years intervened during which time judgments, orders and decrees were made and the Supreme Court sustained each and every one of them and carried the jurisdiction back by amendment as to citizenship to support them all.

We take the broad ground that in courts of the United States, no amendment which will result in an examination of the merits of a cause and reach the

ends of justice will be held to violate any existing rule and it is without exception that these amendments have been allowed at every conceivable stage of the litigation by the authority and with the sanction of the Supreme Court of the United States. I have searched diligently and I have not been able to find a case where the allowance of an amendment to these ends has not been sustained by the Supreme Court.

Section 948, U. S. Comp. Stat. 1901, at page 695:

"Any Circuit or District Court may *at any time*, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues."

Section 954, U. S. Comp. Stat. 1901, at page 696:

"* * * and may at any time permit either of the parties to amend *any defect in the process or pleadings*, upon such conditions as it shall, in its discretion, and by its rules, prescribe."

Hardin v. Boyd, 113 U. S. 760, 28 L. Ed. 1141, at page 1143:

"It may be said, generally, that in passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice.

"This record does not show that the Circuit Court had jurisdiction of the suit, which depends alone on the citizenship of the parties.

"If the citizenship of the defendants was, in fact, such at the commencement of the suit as to give the Circuit Court jurisdiction, it will be in the power of

that court, when the case gets back, to allow the necessary amendment to be made *and then proceed to trial.*"

Atchison, T. & S. F. Ry. Co. v. Gilliland, 193 Fed. Rep. 608, at pages 609, 610 and 611:

"The plaintiff in error now asks that the judgment of the court below be reversed and the case remanded, with instructions to dismiss the case for want of jurisdiction. *Counsel for the defendant in error informs the court* that the defendant in error is now, and at the time of the commencement of the action, was a citizen and domiciled in and a resident of the state of New York, and asks that the cause be remanded, with leave to amend the complaint and be permitted to prove that fact. It appears that plaintiff in error is now, and at the time of the commencement of this action was, a corporation duly organized and existing under the laws of the state of Kansas, having its principal office and place of business in that state. *Had the citizenship of the defendant in error in the state of New York been alleged in the complaint and established by proof, there would have been diversity of citizenship in the parties plaintiff and defendant, and the Circuit Court would have had general jurisdiction over the controversy.*

"The objection that diversity of citizenship was not alleged in the complaint *is a defect that may be cured after verdict, by amendment*, under the provisions of section 954 of the Revised Statutes (U. S. Comp. St. 1901, p. 696). That section provides that the trial court 'may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall, in its discretion and by its rules, prescribe.'

"The chief justice did not say (in Mexican Cent. Ry. Co. v. Duthie, 189 U. S. 76, 47 L. Ed. 715) that the Circuit Court of Appeals would have been constrained

to set aside the verdict. *The remanding of the cause for a new trial with leave to amend would therefore have been only for the purpose of determining the issue as to the jurisdiction of the court.* We are therefore of the opinion that it is necessary to set aside the verdict in this case.

“If the general jurisdiction of the court did in fact depend upon the diverse citizenship of the parties, and the objections are (1) that it was not so alleged in the complaint and (2) that neither the plaintiff or defendant resided in the district where the action was commenced, the answer with respect to the first objection is that the defect cannot be waived, but may be cured by amendment. *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. Ed. 380; *Halsted v. Buster*, 119 U. S. 341, 11 Sup. Ct. 555, 30 L. Ed. 623; *King Bridge Co. v. Otoe County*, 120 U. S. 225, 226, 7 Sup. Ct. 552, 30 L. Ed. 623; *Menard v. Goggan*, 121 U. S. 253, 7 Sup. Ct. 874, 30 L. Ed. 914; *Fitchburg R. Co. v. Nichols*, 85 Fed. 869, 29 C. C. A. 464; *Grand Trunk Ry. Co. v. Reddick*, 160 Fed. 898, 88 C. C. A. 80.

“We are therefore of the opinion that the court below should be directed that the plaintiff be allowed to amend her complaint in accordance with the facts, and that the defendant be given an opportunity to meet the new issue thus raised, and have it determined according to law. If upon such determination, it be found that there is diverse citizenship between the parties, a judgment will be re-entered upon the verdict accordingly.”

Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 457, 44 L. Ed. 842, at page 845:

“Another question as to jurisdiction arises on the record. The citizenship of the members of the several partnerships that are named as defendants does not

appear from the pleadings or otherwise. An allegation as to the state in which those firms were doing business is not sufficient to show the citizenship of the individual partners. The relief sought is the marshaling of all the lien debts on the hotel and the opera house of the Great Southern Fire Proof Hotel Company, the sale of the property, and the distribution of the proceeds among the parties according to their respective rights. As no allusion was made to this latter at the argument before us, we do not now express any opinion upon the question whether the citizenship of the individuals composing the defendant partnerships doing business in Ohio is material to the jurisdiction of the Circuit Court. We leave that to be determined by the court below, if an application be made to amend the pleadings as to the citizenship of the parties.

“Under the circumstances, the plaintiffs should be allowed, upon application, to amend the bill *upon the subject of the citizenship of the parties*. If the amendment shows a case within the jurisdiction of the Circuit Court, the parties should be permitted to proceed to a final hearing.”

Maddox *et al.* v. Thorn, 60 Fed. Rep. 217, at pages 218, 219 and 220:

“There remains to be considered the first assignment of error, which has been earnestly pressed on our attention in the oral argument, and in the printed brief submitted on behalf of plaintiffs in error. It is that:

“The trial court erred in allowing the plaintiff to amend his petition in this cause so as to show *diverse citizenship* of the parties, plaintiff and defendants, after the court, had, from the bench, rendered his judgment herein, and after defendants had moved to arrest said judgment, because there was no allegation and no proof of *diverse citizenship* of the parties, and the court had

no jurisdiction over the case, and because to allow an amendment at that time, and hear testimony upon a new issue, was, in effect, to compel defendants to defend a new suit, without notice or time for preparation, as appears from defendants' bill of exception No. 1.'

"Appellants stand on the proposition that after the judge had announced what his decision was, and what the judgment of the court would be (for it was not yet entered), the court could not, under any circumstances, permit the defect in the record to be cured without awarding a new trial. Without reviewing the authorities (which are very numerous) on the subject of the trial judge's discretion to allow amendments *of substance*, pending a trial, without vacating the submission, we are of opinion that the provision of the statute which say any court of the United States '*may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall in its discretion, or by its rules, prescribe,*' is broad enough to warrant the action of the trial judge in allowing the amendment on terms, and subject to review. The amendment offered was one of *vital substance*. The matter of it is generally susceptible of ready and abundant proof, and hence, in practice, it is most generally not contested,—is virtually admitted when properly pleaded. It is, however, necessary to be proved, unless so virtually admitted, when it is put in issue by proper pleading. It is not now material to inquire what character or amount of proof on that subject is *prima facie* sufficient. The pleading having been sworn to by the plaintiff's counsel, who was still present in court, to be cross-examined if the defendants so desired, and nothing then shown by the defendants, or yet shown by them, to indicate that the discretion was improvidently exercised, we are of opinion that this assignment of error is not well taken."

Bradstreet v. Thomas, 37 U. S. 62, 9 L. Ed. 999, at pages 1001 and 1002:

“A motion has been made by the defendant in error to dismiss this case upon the ground that the averment necessary to give jurisdiction to the courts of the United States do not appear in the record. The decisions which have heretofore been made on this subject render it proper that the circumstances under which this motion comes before the court should be stated.

“A writ of right was brought in the District Court for the Northern District of New York, to recover certain lands situated in the state of New York. The demandant, in her declaration, avers that she is an alien, and a subject of the king of the United Kingdom of Great Britain and Ireland; *but does not aver that the tenant is a citizen of the state of New York, or of any other state of the United States.* The suit was brought to January term, 1825, at which term the tenant appeared, and prayed leave to imparle until the next term; ‘saving all objections as well to the jurisdiction of the court as to the writ and count.’

“The case was continued from term to term, until August term, 1826, when the tenant put in the usual plea to the first count, and demurred to the second and third, setting down special causes of demurrer. The demandant joined in the mise on the plea, and joined in the demurrer; and, in her joinder in demurrer, she averred that the citizenship in the counts was not one of the causes of demurrer assigned by the tenant. The demurrers were decided against the demandant at August term, 1827, and further proceedings were had which it is unnecessary to state here, and the case continued until August term, 1831, when the defendant moved the court to dismiss the suit for want of jurisdiction, assigning as the foundation of this motion the

want of an averment of the pecuniary value of the lands demanded in the counts filed by the demandant.

"The court sustained the motion and dismissed the suit. But at that time no objection to the jurisdiction was made on account of the omission to aver the citizenship of the tenant.

"In 1832 this *dismissal* of the suit was brought before the Supreme Court, and a rule laid on the District Court to show cause why the case should not be *re-instated* in that court; and at January term, 1833, a pre-emptory mandamus was issued by this court, commanding the District Court to *reinstate* the suit, and *'to proceed to try and adjudge according to the law and right of the case, the said writ of right and the mise therein joined.'* The mandamus was obeyed and the cause *reinstated*, and the mise tried and found against the demandant, and judgment entered against her at November term, 1837. The case is now before us upon a writ of error on this judgment; and a motion is made to dismiss the case, upon the ground that neither the District Court nor this court could have jurisdiction of the suit, because the demandant is an alien, and there is no averment that the tenant was a citizen of New York.

"The above statement of the proceedings makes it evident that the dismissal of the suit upon this ground at this time would be a surprise upon the demandant, who has been prosecuting the suit for many years; most probably under the impression that the averment of citizenship contained in her joinder in demurrer was considered by this court and by the District Court to be a sufficient compliance with the rules of pleading established by the decisions of this court, for the averment in question was received in the District Court without objection; and, indeed, would seem to have been regarded as sufficient by that court; because when the suit was dismissed there, upon the ground that the

counts did not contain proper averments to give jurisdiction, no notice was taken of the want of this averment in the counts, nor any objection to the place where it had been inserted in the pleadings, and when the case was brought before this court, on the application for the mandamus, the fault in the pleadings now charged was not noticed by the court in the opinion delivered, and does not appear to have been brought to their attention by the counsel for the tenant. (7 Peters 634.) The demandant might, therefore, reasonably have supposed that the court deemed the averment sufficient, because certainly the mandamus would not have been issued, commanding the District Court to reinstate the case, and proceed to try it, unless this court had been of the opinion that a sufficient cause was presented by the pleadings to give jurisdiction to the District Court.

“The motion is therefore overruled.”

We add the deduction of the principle by text writers as follows:

1 Enc. Pl. & Pr. on pages 510, 511 and 512:

“A federal statute provides for the amendment of defects in pleadings and proceedings in civil actions. And another provision declares in substance that the practice at law in the federal courts shall conform to the practice of the state in which the court is held. Where the state statute allows amendments at any state of the case as a matter of right, the federal court will not exercise a discretion to deny the amendment.

“Defective averments as to the residence of the parties are amendable; and under the authority to amend ‘by inserting other allegations material to the case,’ it has been held that a plaintiff may be allowed to amend his complaint by inserting allegations proper to obviate an objection that the court has no jurisdiction of the cause of action.

“In the federal courts, the want of an averment of diverse citizenship of the parties may be supplied by amendment, and the plaintiff may amend his declaration to show that he was an alien when the action was brought *instead of a citizen as alleged*. Such amendments have been allowed after a demurrer sustained, pending a motion in arrest of judgment on account of the defect, and have been sanctioned by the Supreme Court even where the judgment below has been reversed because the record lacked the proper jurisdictional averments.”

1 Enc. Pl. & Pr. on page 599:

“In some jurisdictions it is the declared policy of the court always to allow amendments of the pleadings on the trial upon just terms when they are found to be so defective that the real subject of dispute cannot otherwise be determined. And the exercise of discretion by the trial court is rarely disturbed where the application to amend is granted.”

Lee v. Murphy, 119 Cal. 364, 51 Pac. 550:

“Considerable space is given in the record and in briefs of counsel as to the alleged error of the court in allowing plaintiff to amend her complaint after having gone to trial and submitted the case for decision. One of the amendments allowed was to the effect that the money loaned to Murphy was the purchase money paid for the land mortgaged. Defendant moved to strike this amended complaint from the files, and to vacate and set aside the order granting plaintiff leave to amend, which motion was denied, and defendant excepted. The power given under section 473, Code Civ. Proc., to allow amendments in the interest of justice, is *uniformly held to be within the discretion of the trial court; and it has been frequently held that this court will not*

disturb the action of the trial court except where an abuse of that discretion is shown. It is unusual to find it necessary to amend the complaint after a case has been submitted; but I find no limitation as to the time before judgment entered when the power of the court ceases, and even after judgment it may be exercised for the relief of a party where the judgment results from mistake, inadvertence, surprise or excusable neglect."

Southworth v. Resing, 3 Cal. 377, at page 378:

"And as a matter of practice, it is safest to award an arrest, even in cases of doubt, because the defendant is protected by the undertaking of the plaintiff, which the law requires to that effect, while on the other hand, frauds are proverbially concocted with so much artfulness and ingenuity as render them at all times difficult to be exposed; and when such a case actually exists, the plaintiff is remediless, without the process of arrest. A different rule would almost, if not certainly, destroy its efficiency as a legal remedy."

Counsel for defendants have overlooked the fact that the United States Supreme Court has drawn a clear and substantial distinction between decisions where the District Court is without jurisdiction for an entire want of facts to constitute a cause of action which would deprive it of jurisdiction and decisions where for the want of an allegation of citizenship it is without jurisdiction. In the former case, it is of far greater importance and the question of relation to the commencement of the action is not at all as clear as is the case when, as the cases repeatedly reiterate: *"The jurisdiction depends alone upon diversity of citizenship."* The court will observe that this distinction is constantly held before the mind and that the omission to allege

proper citizenship is such an omission of jurisdictional fact as calls for the liberal allowance of amendments.

Maddox *et al.* v. Thorn, 60 Cal. App. 217, 218 and 219:

“Where the trial court allowed plaintiff to amend his petition so as to show *diverse citizenship*.”

And the court say:

“The matter of it is generally susceptible of ready and abundant proof, and hence, in practice, it most generally is not contested,—is virtually admitted when properly pleaded.”

(b) Said amendment related back to the filing of the original complaint, being an amendment to the original complaint.

Birdsall v. Perego, 5 Blatchf. (U. S.) 251:

“In the federal courts it is proper in an amended declaration to state the citizenship of the parties in the *present tense*, without stating such citizenship as existing at the time of the commencement of the suit, because *the amendment relates back*.”

1 Inc. Pl. & Pr. at page 621:

“When an amendment has been properly made and is for the same cause of action, the amended pleading is regarded as a continuation of the original pleading and *takes effect* as of the date when the latter (the original pleading) was filed.”

Fleenor v. Taggart, 116 Ind. 189:

“Where a judgment is reversed on appeal, a proper amendment filed after remand to the trial court *relates to the commencement of the suit*.”

Fling v. Trafton, 13 Me. 295:

“Where the name of one of two defendants was stricken out by permission of the court on motion of the plaintiff and with the assent of the only defendant appearing in defense, the action stood as if it had been originally brought against the only remaining defendant, and a writ of review was properly brought in the name of the latter alone.”

Cooke v. Cooke, 43 Md. 522:

“A suit upon the causes of action set forth in the amendment, provided it be not entirely new, will be considered as pending from the beginning as regards an intervening fraudulent conveyance made by the defendant.”

Link v. Jarvis, 33 Pac. at 207:

“Besides, an amended complaint relates back to the commencement of the action, if a new cause of action is not pleaded, and new parties are not brought in.”

Barber v. Reynolds, 33 Cal. 497, at page 500.

White v. Soto *et al.*, 82 Cal. 654, 23 Pac. 211:

“The amended complaint was filed on July 22, 1885, but, as it was based upon the same cause of action, *it related back to the date upon which the original complaint was filed.*”

Preston v. Culbertson, 58 Cal. 198, at page 208:

“The amended complaint does not allege a cause of action against any new party; *it relates to the commencement of the contest.*”

Easton v. O'Reilly, 63 Cal. 305, at page 308:

““The amended complaint supersedes the original, but there is no dismissal of the action. It simply takes the place of the other. No new or different action is

commenced, and no new cause of action is introduced. There is no change in the identity of the cause of action. That is the same as before, and the commencement of the action *dates from the filing of the original complaint* and the issuing of summons thereon.’ ”

Lorenzana v. Camarillo, 45 Cal. 125, at page 128:

“The defense of the Statute of Limitations must fail, inasmuch as it points to the time of filing the amended and not *the original complaint as the period of time at which the statute is claimed to have barred the plaintiff.*”

Marshalltown Stone Co. v. Louis Brach Const. Co., 125 Fed. Rep. at page 748:

“Defendants demur to this count of the petition for the same reason as they demurred to the first count; and they seek to make the point that the action was not brought within six months from the 15th of April, 1902, because on December 5, 1902, the plaintiff filed an amended and substituted petition. The defendants insist that this amended and substituted petition was the bringing of a new action. But from the original petition it will be seen that plaintiff makes complaint of the grievances as in its amended and substituted petition. The occasion for filing the amended and substituted petition was to correct some omissions in the exhibits, and with more certainty state the cause of action. This being so, *the action should be regarded as commenced when the original notice therefor was given to the sheriff for service.* The demurrer of both defendants will be overruled.”

Middlesex Bk. Co. v. Smith, 83 Fed. Rep. 133;
Southern Pacific M. Co. v. Superior Court, 14
Cal. App. 240, at page 241.

To the strength of the foregoing cases, we beg to reiterate that all the cases cited under the first proposition should be added hereto for the plain reason that they and all of them carried the effect of the amendment back to the commencement and to the filing of the original complaint.

(c) The allegation of citizenship in the amendment in the present tense was sufficient and proper, and, coupled with the affidavits and motion for leave to amend, all of which are a part of the record, show the necessary diverse citizenship to have existed at the time of the filing of the original complaint.

Birdsall v. Perego, 5 Blatchf. 251 :

“In the federal courts it is proper in an amended declaration to state the citizenship of the parties in the *present tense*, without stating such citizenship as existing at the time of the commencement of the suit, because *the amendment relates back*’.

“The declaration, which was an amended one, set out that the plaintiff ‘is a citizen of the state of Indiana’ and that the defendant ‘is a citizen of the state of New York.’

“But, it is insisted on the part of the defendant, that the declaration is bad in substance, because it states the citizenship of the parties in the present tense, instead of stating said citizenship as existing at the time of the commencement of the suit, it being insisted that this allegation of the amended declaration related to the date of the filing of that declaration, and not to the time of the commencement of the suit. The objection must be overruled.”

Mexican Central Railway Company v. Duthie, 189 U. S. 74, 47 L. Ed. 715, at page 716:

“The record shows ‘that no further proceedings were had in said cause after entry of said judgment until, to-wit, the 17th day of April, 1902, on which day plaintiff filed his motion asking leave to amend his petition,’ to the effect ‘that leave be granted him to now amend his said original and first amended petition by inserting therein the following: ‘And is a citizen of said state and of the United States of America,’ after the allegation made in said pleading ‘that plaintiff resides in El Paso, in El Paso county, state of Texas.’ ”

(d) The court had the right to look at the whole record, the complaint as well as the affidavits, in passing upon the application for the order of arrest, or on a motion to vacate the same, and this, too, at the time of hearing the motion.

McBride v. Langan, 10 N. Y. Supp., 18 Civ. Proc. R. 201:

“Where the complaint in an action for goods sold alleges, in the language of Code Civ. Proc. 549, Sub. 4, providing for arrest in civil cases, that the defendants were ‘guilty of a fraud in contracting or incurring the liability,’ it may be amended so as to state the facts constituting the fraud.”

Blakelee v. Buchanan, 44 How. Prac. 97:

“When the judge who grants an order of arrest becomes judicially satisfied, from the allegations contained in the *complaint and affidavit*, that a cause of action exists, and that it is not one of a trivial character, and it cannot be said from the proof presented upon the notice to vacate the order of arrest that the

discretion of the judge was erroneously exercised, the motion to vacate will be denied.”

Chapman v. H. D. Mercantile Co., 53 Pac. 778:

“The defendant stated in his motion to vacate the order of arrest that the papers in this cause will be used in evidence on the hearing of this motion. Upon the hearing of the motion all the papers and files of the case, if competent, were proper for the consideration of the court. The amended affidavit became one of the papers in the case when filed, and was proper evidence for consideration, on the hearing of the motion, as one of the papers in the case.”

In Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, and cases therein embraced and cited, the court will observe that the United States Supreme Court, in harmony with the cases cited in this brief, uses this language, “the difference of citizenship on which the right of removal depends *must have existed at the time when the suit was begun*,” and that the necessary citizenship must affirmatively appear from the pleadings or *elsewhere in the record*.

The same is true of King Iron Bridge and Mfg. Co. v. County of Otoe, 120 U. S. 225: “*From the record*.”

And in Parker v. Ormsby, 141 U. S. at page 83: “*Upon the record*.”

And it is a rule without exception that if the jurisdictional fact of citizenship appears *in any part of the record* while the District Court has control of that record, it is sufficient.

Denny v. Pironi & Slatrì, 141 U. S. 121, 35 L. Ed. 657, at page 658:

“It has been repeatedly held that it was not necessary for the averment to appear in the pleadings, but that the statute was complied with *if it appeared in any part of the record.*”

Mexican Central Railway Co. v. Duthie, 189 U. S. 76, 47 L. Ed. 715, at page 717:

“And since the trial court in the present case *still had control of the record it had jurisdiction to act, etc.*”

Kennedy *et al.* v. The Bank of the State of Georgia, 49 U. S. 586, 12 L. Ed. 1209, at page 1219:

“But the mandate of this court which contained the amendment as to the citizenship of the stockholders of the bank, * * * was filed on the 6th day of May, 1830, in the Circuit Court, and it necessarily became a part of the record of that court. This was before the final decree was entered and it removed the objection to the jurisdiction of the court. *After this, the decree could not have been reversed for want of jurisdiction.*”

Hanson v. Langan, 16 N. Y. Supp. 383:

“Where the complaint states a sufficient cause of action on contract, and the affidavit filed with it states in detail the facts constituting the fraud, the order of arrest should not be vacated without first giving plaintiff an opportunity to amend his complaint.”

It is pertinent in this connection to call the court's attention to the amended notices of motions to vacate the order of arrest made by plaintiffs in error in the District Court, and to the language there used: “Said motion will be based upon this notice of motion, and upon the *records, files and pleadings in said action.*”

See paragraph IV of each of the amended notices of motions for an order vacating order of arrest [pp. 153, 155, 158 and 160, Tr. of Rec.]; also see paragraph III of notices of motion to vacate order of arrest [pp. 143, 147, 149 and 151, Tr. of Rec.] where same language is used.

It will be noted that the statement of plaintiffs in error that “we are making this motion under section 503, *upon the papers on which the order of arrest was made*” (first three lines of paragraph two, page 36, brief of plaintiffs in error), is incorrect.

We cite the following additional cases:

Pitts., Cinn. and St. Louis Ry. Co. v. Ramsey,
22 Wall. 322, 22 L. Ed. 823, at page 824 (second paragraph);

Ex parte Smith, 4 Otto 455, 24 L. Ed. 165, at
page 166 (third paragraph);

Bridges v. Sperry, 5 Otto 401, 24 L. Ed. 390
(Second paragraph).

Robertson v. Cease, 7 Otto 646, 24 L. Ed. 1057, at
page 1058:

“It is the settled doctrine of this court that, in cases where the jurisdiction of the federal courts depends upon the citizenship of the parties, the facts, essential to support that jurisdiction, must appear *somewhere in the record*. Said the present chief justice, in R. Co. v. Ramsey, 22 Wall. 322, 22 L. Ed. 823: “They need not necessarily, however, be averred in the pleadings. It is sufficient if they are, *in some form, affirmatively shown by the record.*”

Gordon v. Third National Bank, 144 U. S. 97, 36 L. Ed. 360, at page 362:

"The question of jurisdiction is raised for the first time in this court, and as we are of opinion that the diverse citizenship of the parties appears affirmatively and with sufficient distinctness from the record, *of which the summons forms a part*, we must decline to reverse the judgment on this ground, although greater care should have been exercised by the plaintiff in the averments upon that subject."

Ex parte Cohen, 6 Cal. 320 (last paragraph on page).

Second. In response to the second, sixth, tenth and fourteenth assignments of error, they being identical, but set forth separately for different plaintiffs in error, defendant in error contends:

1. The diversity of citizenship necessary to give the court jurisdiction of the parties need not *be made to appear in or by the affidavits upon which the order of arrest is based*.

Cooper v. Dungler, Fed. Cas. No. 3,192, 4 McLean (U. S. 1847) 257:

"An affidavit to hold to bail in a suit in the Circuit Court of the United States *need not state that the plaintiff is a citizen of a state other than that in which the suit is brought or an alien*."

United States v. Walsh, Fed. Cas. No. 16,635, 1 Abb. (U. S.) 66, Deady 281:

"Where the cause of action and arrest are identical, a verified complaint is a sufficient affidavit upon which to allow an order of arrest."

Crandall v. Bryan, 15 How. Prac. 48:

“There is no necessity that the papers presented as the basis of an application for an order of arrest on the ground of fraud should make out every fact entering into the fraud by evidence which would be competent to establish it on affirmative recovery.”

Hanson v. Langan, 9 N. Y. Supp. 625.

Hanson v. Langan, 16 N. Y. Supp. 383:

“Where the complaint states a sufficient cause of action on contract, and the affidavit filed with it states in detail the facts constituting the fraud, the order of arrest should not be vacated without first giving plaintiff an opportunity to amend his complaint.”

McBride v. Langan, 10 N. Y. Supp. 554, 18 Civ. Proc. R. 201:

“Where the complaint in an action for goods sold alleges, in the language of Code Civ. Proc. 549, Sub. 4, providing for arrest in civil cases, that the defendants were ‘guilty of a fraud in contracting or incurring the liability,’ it may be amended so as to state the facts constituting the fraud.”

Blakelee v. Buchanan, 44 How. Prac. 97:

“When the judge who grants an order of arrest becomes judicially satisfied, from the allegations contained in the complaint and affidavit, that a cause of action exists, and that it is not one of a trivial character, and it cannot be said from the proof presented upon the notice to vacate the order of arrest that the discretion of the judge was erroneously exercised, the motion to vacate will be denied.”

Knox v. Greenleaf, Fed. Case No. 7, 909:

“If the question before the court be doubtful as to

law or fact, the court will not discharge on common bail, but will put the defendant to his plea.”

Southworth v. Resing, 3 Cal. 377, at page 378,
supra;

Mansfield C. & L. M. R. Co. v. Swan, 111 U. S.
379, 28 L. Ed. 462, *supra*;

King Iron Bridge & Mfg. Co. v. Co. of Otoe,
120 U. S. 225, 30 L. Ed. 623, *supra*;

Parker v. Ormsby, 141 U. S. 81, 35 L. Ed. 654,
supra;

Denny v. Pironi & Slatry, 141 U. S. 121, 35 L.
Ed. 657, at page 658, *supra*;

Mexican Central Railway Co. v. Duthie, 189
U. S. 76, 47 L. Ed. 715, at page 717, *supra*;

Kennedy *et al.* v. The Bank of the State of
Georgia *et al.*, 49 U. S. 586, 12 L. Ed. 1209,
at page 1219, *supra*;

Pitts., Cinn. and St. Louis Ry. Co. v. Ramsey,
22 Wall. 322, 22 L. Ed. 823, at page 824
(second paragraph);

Ex parte Smith, 4 Otto 455, 24 L. Ed. 165, at
page 166 (third paragraph);

Bridges v. Sperry, 5 Otto 401, 24 L. Ed. 390
(second paragraph);

Robertson v. Cease, 7 Otto 646, 24 L. Ed. 1057,
at page 1058 (fifth paragraph);

Gordon v. Third National Bank, 144 U. S. 97,
36 L. Ed. 360, at page 362, *supra*;

Ex parte Cohen, 6 Cal. 320 (last paragraph on
page).

2. The affidavits are sufficient as to allegations of fact, and meet every requirement of the laws of the state of California.

See section 479, California Code of Civil Procedure, which reads:

“The defendant may be arrested, as hereinafter prescribed, in the following cases:

“1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors.

“4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought.

“5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.”

(a) In compliance with this requirement of the statute and under subdivision one of section 479, it is set forth, in the affidavit of Elizabeth Knudsen [p. 93, Tr. of Rec.] :

“Affiant further says, that the defendant Edwin R. Crooker has repeatedly stated within the past sixty days, to persons in the city of Los Angeles, that he intended to go to England to remain indefinitely.”

And on the same page:

“That the defendants Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker and W. P. Ellis are at this time preparing for immediate departure from the United States by steamer for Australia with the inten-

tion of remaining permanently out of the United States.”

And at page 95, transcript of record:

“Affiant further says that during the past twelve months she has repeatedly endeavored to locate the said Edwin R. Crooker and Harry L. Crooker and has repeatedly failed, but that within the last thirty days she had a conversation with a business man of the city of Los Angeles and that the person was reluctant to give affiant any information concerning the said company or the said Crookers and would not do so until affiant promised him that she would not in any way use his name in connection with this litigation; that she did promise not to use his name; that thereupon the person referred to told affiant that he had seen and talked with Edwin R. Crooker in the city of Los Angeles on or about the 20th of December, 1914; that the said Crooker had told him that he was preparing to leave the United States and to go to England where he expected to carry on business.”

And again at page 96:

“Affiant further says that the person above referred to at the said time and place told affiant that the said Edwin R. Crooker had told said person that he, said Crooker, had just returned to America from England and that in England he was doing an excellent business, and was anxious to return to England because on the day that the war broke out, he, the said Crooker, was about to close a \$100,000 deal; that said Crooker told him that in England the old business was very good, but that they were going to use the same old plan and contract that they used here in connection with the sale of clothes-washers, ovens and flues, and in the United States were going to operate with a new and different scheme in connection with other articles.”

And while this affidavit is based, as of necessity it must be, largely upon information and belief, the affidavit complies strictly with the statute, California Code of Civil Procedure, section 481:

“The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded.”

In compliance with this statute, the affidavit contains [p. 94, Tr. of Rec.] “the facts upon which the information and belief are founded.” [Pp. 94, 95 and 96, Tr. of Rec.] And in addition thereto it will be observed that the affidavit sets forth [p. 95, Tr. of Rec.]:

“Affiant further says that during the past twelve months she has repeatedly endeavored to locate the said Edwin R. Crooker and Harry L. Crooker and has repeatedly failed.”

And again [p. 96, Tr. of Rec.]:

“Affiant further says that at various times during the past sixteen months she has tried to get service upon Edwin R. Crooker and Harry L. Crooker in an effort to get redress for the wrongs done her through the courts, but that in each instance the said Crookers have eluded service and have departed from the places where she sought to prosecute actions against them before service could be had upon them.”

And immediately following this language she sets forth and recites incidents, times and conditions when the said Crookers suddenly absconded, which recital please see pages 97, 98 and 99, transcript of record.

Again at page 88, transcript of record, the affidavit sets forth:

“That the defendants and each of them will, immediately upon learning of the filing of this action, absent themselves from the jurisdiction of this court, and will leave the state of California, and the United States, and avoid the service of writs and processes issued out of this court, upon them.”

And again [beginning in the sixth line from the bottom of p. 92, Tr. of Rec.] :

“And that said Edwin R. Crooker and Harry L. Crooker do not abide or remain in any one place for any considerable length of time but are for the most part and for the greater part of time traveling from one state to another within the United States, and from the United States to foreign countries.”

We feel that the foregoing quotations, while they do not constitute all of the matter in the affidavit of the character, sufficiently show compliance with the statute, and, when an affidavit is made upon information and belief, the facts upon which the information and belief are founded may also be stated upon information and belief.

Matoon v. Eder *et al.*, 6 Cal. 57:

“The affidavit on which the writ issued made the statutory averments of fraud on information and belief, and also set forth *on information and belief* the facts on which the belief of fraud was founded.

“An examination satisfies my mind that the affidavit, on which the order of arrest was issued, is sufficient, and this would dispose of the point, were it not desirable that some rule should be established to govern future cases.”

8 Encyc. Pl. & Pr. 601:

"If, however, the facts are stated on information and belief, the sources of the information should be shown, and the methods by which it was communicated, in order to enable the court to see that the party's belief is well founded. And it should be shown why the affidavit of the party from whom the information was received is not produced.

"If the affidavit is not based on the personal knowledge of the party, the facts should not be so stated. An affidavit stating facts as within the personal knowledge of affiant, when clearly they are not, is insufficient to sustain an order of arrest."

8 Encyc. Pl. & Pr. 604:

"Or, if the statement is on information and belief, the informant's name should be given, or the reason stated why it is not given, or why his affidavit has not been obtained and presented."

Tallman v. Whitney, 5 Daly (N. Y.) 505:

"In an action for deceit, where an order of arrest has been obtained on proof of the same facts as those alleged in the complaint, the order will not be vacated unless it is clear that on the trial the plaintiff must fail in his proof of the facts charged in his complaint."

3 Cyc. 972:

"(II) *Prima facie* force of affidavit to hold to bail. When defendant moves on the merits to vacate the order of arrest, or to be discharged from arrest, the affidavit to hold to bail, or other evidence upon which the order was granted, is *prima facie* sufficient to sustain the order. Hence, the defendant's evidence should squarely and unequivocally meet that upon which the order was granted.

“(III) Burden of Proof. The burden of proof is on plaintiff when the order was granted on a *ground extrinsic to the cause of action*, and is on defendant when the order was granted on a *ground identical with or dependent upon the cause of action.*”

(b) In compliance with the statute and under subdivision four of said section 479, California Code of Civil Procedure, the affidavit shows “the fraud in contracting the debt or incurring the obligation for which the action is brought.”

At page 91, Tr. of Rec.: “Affiant further says that the defendants, and each of them, have been guilty of a fraud in contracting the debt and in incurring the obligation for which the above-entitled action is brought.”

Again [p. 74, Tr. of Rec.], beginning in line 4 and all matter thereafter following to and including the words, “penury and want,” in the third line from the bottom of page 87, Tr. of Rec., will be found a continuous statement of the acts of fraud.

And, again [beginning at the bottom of page 89, all of page 90, and ending on page 91, Tr. of Rec.], will be found additional acts of fraud enumerated.

And, again [beginning with the last paragraph on p. 100, Tr. of Rec., and all matter thereafter following to and including the words, “have the money,” at the end of the affidavit on p. 104, Tr. of Rec.], will be found further acts of fraud.

For additional and more convincing and conclusive acts of fraud upon the part of the plaintiffs in error, as alleged in said affidavit, see the contract, it being

Exhibit "A," and a part of said affidavit [pp. 105 to 121, inclusive, Tr. of Rec.].

(c) The affidavit is sufficient upon the fact of disposal, removal and secretion of property by the plaintiffs in error under subdivision five of section 479, California Code of Civil Procedure, as shown by the affidavit [beginning in the third line from the bottom of page 87, Tr. of Rec., and continuing to the middle of page 88, Tr. of Rec.].

Again [beginning in the nineteenth line of p. 90, Tr. of Rec.], this language will be found:

"That the said defendants, and each of them have, almost from the commencement of business by the defendant corporation, kept the property and assets of said corporation hidden, secluded and so far as possible out of the reach of process of courts, and have kept the money of said corporation and their own money in private vaults and other secret places where the same could not be reached by the process of law, and that Edwin R. Crooker, one of said defendants, has even threatened this affiant with violence and bodily harm, if she made further attempt to recover the monies due her."

And, again [p. 91, Tr. of Rec.] :

"Affiant further says that the defendants, and each of them, have removed, have disposed of, and have hidden, secreted and kept in secret places, the property of the defendant corporation, Domestic Utilities Manufacturing Company, and the property of each of the said several defendants for a long time prior to this date with the intent to defraud the creditors of the defendant, Domestic Utilities Manufacturing Company, and of

them, the said several individual defendants, and particularly to defraud this affiant.”

And, again [p. 103, Tr. of Rec.]: “Affiant further says that each and all of said defendants have been personally and equally active in hiding and secluding the property of said corporation to prevent recovery by persons who were wronged by said defendants,” and the paragraph immediately thereafter following and ending on page 104, Tr. of Rec.

Third, in response to the third, seventh, eleventh and fifteenth assignments of error, they being identical, but set forth separately for different plaintiffs in error, defendant in error contends:

1. That the first ground or reason given, to-wit, that the complaint in said action, at the time of the issuance of said order of arrest, showed affirmatively upon its face that the diversity of citizenship necessary to confer jurisdiction upon said court did not exist, is fully met and answered by the authorities herein above cited in response to assignments of error first, fifth, ninth and thirteenth.

2. It does appear from said complaint that a cause of action existed against said plaintiffs in error as appears from said complaint and parts thereof to which reference is made as follows:

- (a) As to the corporate existence of said corporation and the relation of the individual defendants thereto, see paragraphs second, third and fifth of complaint [pp. 7, 8 and 9, Tr. of Rec.].

- (b) As to the execution of the contract involved,

see paragraphs fourth and fifth of complaint [pp. 8 and 9, Tr. of Rec.].

(c) As to plaintiff's reliance upon the promises and agreements in the contract and the entry upon the performance of the contract by plaintiff, see paragraphs seventh and ninth of complaint [pp. 10 and 11, Tr. of Rec.].

(d) Defendants failed to carry out the contract; paragraph ninth of complaint [pp. 11 and 12, Tr. of Rec.].

(e) As to fraud, see last three lines page 12 to the end of first paragraph on page 24, Tr. of Rec., inclusive; paragraphs eleventh, twelfth, thirteenth and fourteenth of complaint [pp. 25 to 35, Tr. of Rec.].

(f) As to sums paid for the purchase of goods which were never delivered by defendants, see subdivision (b) of paragraph ninth of complaint [pp. 16, 17 and 18, Tr. of Rec.].

(g) As to outlays of money in establishing factories and salesrooms with the consent and authority of defendant corporation and the hindrance and ruination thereof by the defendants, see subdivisions (c), (d) and (e) of paragraph ninth of complaint [pp. 17 to 21, inclusive], and paragraph twelfth of complaint [pp. 26 to 32, inclusive, Tr. of Rec.].

(h) As to failure of defendants to repay any moneys by plaintiff paid to defendants for goods which were never delivered and their failure to repay to plaintiff sums by her paid out, and the failure of defendants to reimburse plaintiff for losses by them occasioned, see paragraph eleventh of complaint [pp. 35 and 36, Tr. of Rec.].

(i) As to demands for repayment of said sums, see first lines of paragraph eleventh of complaint [p. 25, Tr. of Rec.].

(j) As to *bona fides* of defendant in error, see paragraph seventh of complaint [p. 10]; also, paragraph ninth of complaint [p. 11]; also, paragraph tenth of complaint [p. 24, Tr. of Rec.]; also, agreement, "Exhibit A" to complaint, beginning on page 37, Tr. of Rec., and also retail contract, beginning at page 51, Tr. of Rec.

(k) As to hindrance, damage and destruction of business of defendant in error by plaintiffs in error, see paragraph ninth of complaint [pp. 11, 12 and 13, Tr. of Rec.]; also first paragraph on page 15, Tr. of Rec.; also subdivisions (a), (c), (d) and (e) of paragraph ninth of complaint [pp. 15, 17, 18 and 20, respectively]; also last paragraph [p. 23], and first paragraph [p. 24]; also paragraph thirteenth of complaint [pp. 32 and 33, Tr. of Rec.].

It also appears from the affidavit in support of application for the order of arrest that a cause of action existed against said plaintiffs in error, inasmuch as the affidavit embraces all that is in the complaint and in almost the identical language, and in addition thereto sets forth the things required by the statute to be set forth in an application for an order of arrest, and we quote from the affidavit at length so that the court may, upon a mere examination, observe the correctness of the foregoing statement:

(a) Entered into contract [bottom of p. 69, Tr. of Rec.].

(b) Individual plaintiffs in error were officers and controlled the defendant corporation [p. 70, Tr. of Rec.].

(c) Published and circulated printed matter, and offered for sale and proposed to sell to members of the public certain clothes-washers, etc., and patent rights and the right to purchase and to sell, wholesale and retail, said articles, and affiant received and read said printed documents, believed and relied upon them, and so believing and relying executed the contract [p. 71, Tr. of Rec.].

(d) Plaintiffs in error represented that Domestic Utilities Manufacturing Company was actually engaged in the manufacture and sale of said articles, and that said statements and pretenses and representations in all said documents and in said contract were false; and were a sham and deceit, and worked a fraud upon affiant in this, that defendant corporation was not, nor had it ever been, actually or really manufacturing said articles, except in limited quantities [p. 75, Tr. of Rec.]. And instead of being actually and really engaged in the manufacture and sale of said washers, made a pretense so to do as a blind, shield and screen to its real business and objects, which were to sell its said contracts, etc. [p. 76, Tr. of Rec.].

(e) That defendant in error entered upon the business of selling said articles in accordance with the terms of said contract and paid out large sums of money from her own private funds, and paid to said corporation large sums of money for clothes-washers, etc., to be delivered to her and various other persons, but washers were never delivered [pp. 71 and 72, Tr. of Rec.]. And

in all things carried on and performed the contract, but said corporation utterly failed, etc., to carry out its part of said contract or to deliver goods purchased and paid for, or any part of them, though often demanded, but instead delivered defective, damaged and unsaleable articles, which were utterly worthless; she sold 30,000 clothes-washers to the public—corporation never delivered over 4,000 washers—created obligations to deliver articles sold and by failure of the corporation to deliver she was compelled to and did, with the consent of the corporation, establish factories and did manufacture the articles to fill her sales [pp. 73 and 74, Tr. of Rec.].

(f) Fraud and conspiracy alleged and the acts constituting the same [pp. 74 and 75, Tr. of Rec.].

(g) Corporation only manufactured 500,000, but sold ten millions [pp. 75 and 76, Tr. of Rec.].

(h) Defendants encouraged sale of contracts and discouraged sale of articles and hindered and prevented defendant in error from doing business as contemplated by the contract [pp. 76 and 77, Tr. of Rec.].

(i) Purchased articles and paid to corporation \$13,003.00. Corporation received said sum, but refused to deliver articles, which never have been delivered [p. 77, Tr. of Rec.]. Though often demanded [p. 78, Tr. of Rec.].

(j) Defendant in error established factories and salesrooms in various cities, and plaintiffs in error cut prices on the articles in cities where her factories were established to prevent sales by defendant in error and drove her out of business [pp. 78 and 79, Tr. of Rec.]. And further hindered defendant in error by circulating

a letter, Exhibit B of the affidavit [pp. 81, 82, 83, 84 and 122, Tr. of Rec.]. All as part of the conspiracy, and to avoid performance by the defendants [pp. 84 and 85, Tr. of Rec.].

(k) Defendant in error acted in good faith [p. 85, Tr. of Rec.]. Sought redress against plaintiffs in error [pp. 85 and 86, Tr. of Rec.].

(l) Has demanded repayment of moneys paid [p. 86, Tr. of Rec.].

(m) Plaintiffs in error guilty of universal and continuous practice of issuing bogus warehouse receipts without the goods behind them and delivered such a receipt to defendant in error, and although goods were demanded they were never delivered [pp. 86 and 87, Tr. of Rec.].

(n) That the corporation and individual defendants have always kept its and their money and property hidden and covered up and out of reach of legal process, etc. That they have property, but the same cannot be reached, and that the property of the individual defendants was all acquired through the methods described [pp. 87 and 88, Tr. of Rec.].

(o) That plaintiffs in error and each of them will abscond, will remove and dispose of property and obliterate all evidence of location [p. 88, Tr. of Rec.].

(p) No adequate remedy at law [pp. 88 and 89, Tr. of Rec.].

(q) Defendant in error was induced to enter into the contract through the fraud, deception, false statements and representations made to her, by plaintiffs in error, made at and before the entering into of said

contract and by the contract itself [pp. 89 and 90, Tr. of Rec.].

(r) Has demanded redress of the wrongs, and plaintiffs in error showed defiance of law and courts and of defendant in error's rights [p. 90, Tr. of Rec.].

(s) Damages complained of resulted from the breach by plaintiffs in error [pp. 90 and 91, Tr. of Rec.].

(t) Statutory allegation of fraud [pp. 91 and 92, Tr. of Rec.].

(u) Plaintiffs in error have removed, disposed of, etc., property of the corporation and of said individual plaintiffs in error and of themselves, the individual plaintiffs in error [p. 91, Tr. of Rec.].

(v) That plaintiffs in error have appropriated to their own use and benefit all money and profit of the corporation, gained through their practices [p. 92, Tr. of Rec.].

(w) That Edwin R. Crooker and Harry L. Crooker are constantly on the move from state to state and to foreign countries in carrying forward their schemes [pp. 92 and 93, Tr. of Rec.].

(x) Edwin R. Crooker has repeatedly declared intention to go to England to remain indefinitely [p. 93, Tr. of Rec.].

(y) That plaintiffs in error were at the time of the filing of the affidavit preparing for immediate departure from the United States [p. 93, Tr. of Rec.].

(z) States source of her information and gives reasons why source of her information makes no affidavit [pp. 94, 95 and 96, Tr. of Rec.].

(aa) Has made repeated efforts to apprehend plaintiffs in error; that plaintiffs in error in each instance slipped away [pp. 96, 97, 98 and 99, Tr. of Rec.].

(bb) Defendant in error has realized no profits or advantages, and as soon as she learned of the fraud ceased to do business and undertook to correct and undo her error in engaging in said business and to reimburse persons who had lost through her agency [pp. 99 and 100, Tr. of Rec.].

(cc) In entering into said contract and purchasing said articles she dealt with plaintiffs in error and their representatives and was deceived [pp. 101 and 102, Tr. of Rec.].

(dd) Plaintiffs in error have at all times had absolute control, management and domination of the corporation and have been the framers, moulders and instigators of all its policies, schemes and plans [pp. 102 and 103, Tr. of Rec.].

(ee) As fast as money or property was acquired, individual plaintiffs in error divided the same among themselves; obscured title by fictitious names [pp. 103 and 104, Tr. of Rec.].

(ff) Defiance of law and obligations [p. 104, Tr. of Rec.].

(gg) And in addition to the foregoing allegations of fact, defendant in error sets forth in her affidavit the contract entered into by her as Exhibit A [p. 105, Tr. of Rec.], and the terms of said contract show the same to be an endless chain scheme and a fraud, and was so held and found to be true by the Honorable W. H. Lamar, an assistant attorney-general of the United States [pp. 97, 85 and 86, Tr. of Rec.].

Yet counsel for plaintiffs in error contend that the affidavit does not show that a cause of action existed.

3. The amendment to the complaint relates back to the filing of the original complaint.

See authorities cited under division first, subdivision (b), this brief.

4. The amendment to the complaint and the motion and affidavits show diversity of citizenship sufficient to confer jurisdiction upon the district court at the commencement of the action.

It will be observed that the amendment was not an amended complaint, but an *amendment to the complaint*.

The motion for leave to amend the complaint [p. 132, Tr. of Rec.] asks leave to amend "By making the first paragraph of her said complaint read as follows:

"First. That she is a single woman, and is a citizen of the state of Alabama, one of the states of the United States of America, instead of

" 'First. That she is a single woman, a resident and citizen of the city of Washington, in the District of Columbia,' as her said complaint now reads at lines sixteen and seventeen of page one of her said complaint, * * *

And it is stated in the motion (paragraph 1, *id.*) "That at the time of the making and filing of her said complaint herein, she was and still is a citizen of the state of Alabama, and was not a citizen of the city of Washington or of the District of Columbia;" and said motion goes on to explain how the error occurred, and the same facts are made to appear in the affidavit in support of motion to amend [p. 136, Tr. of Rec.], and

particularly on page 137, Tr. of Rec., and a statement of how the error occurred appears also in the affidavit of Robert L. Hubbard in support of motion for leave to amend complaint [pp. 138, 139 and 140, Tr. of Rec.].

An amendment of this character is sufficient, if it states the citizenship in the present tense, and need not state that the citizenship necessary to confer jurisdiction existed at the time of the commencement of the action.

Please see authorities hereinabove cited under subdivisions (b), (c) and (d) under the *first* division of this brief, and also the authorities cited under the *second* division of this brief.

5. The affidavit filed in support of the application for an order of arrest presents the necessary facts under the statute, section 479, Cal. Code Civ. Proc., *supra*, to warrant the issuance of the order of arrest, and under the terms of section 481, Cal. Code Civ. Proc., shows "that a sufficient cause of action exists, and that the case is one of those mentioned in section 479 of said code," the provisions of which are set forth in this brief at page . . . , and the court may look to the record to see if a cause of action is pending, and a federal court may issue the order of arrest upon the complaint alone, and even though no affidavit at all is on file, and is not limited to the affidavit filed.

Ex parte Cohen, 6 Cal. 320. (Last paragraph on page.)

United States v. Walsh, Fed. Cas. No. 16,635, 1 Abb. (U. S.) 66, Deady 281:

"Where the cause of action and arrest are identical, *a verified complaint is a sufficient affidavit upon which to allow an order of arrest.*"

Ord v. Hosmer, circuit judge (Mich.), 125 N. W. 681, at page 682:

"This is mandamus to require the circuit judge to enter an order quashing a writ of *capias*. The writ was accompanied by an affidavit, as follows: * * * he believes the said S. W. Co. is entitled to recover the sum, etc. * * * Ord was agent and factor and after termination of relationship collected outstanding debts and used to his own benefit.

"The criticism made upon this affidavit is that the affidavit states merely a conclusion and does not appear to be made upon the information of affiant. We agree with the circuit judge that the affidavit is not open to this criticism, and there is enough of substance contained in the affidavit to warrant the order holding to bail."

Muir v. Brooks, Circuit Judge (Mich.), 114 N. W. 659:

"Relator was taken into custody and released on bail, and afterwards appeared specially and made a motion to vacate the order holding to bail and quash the writ of *capias*, for a number of reasons which may be briefly summarized as follows: (1) The affidavit for the writ does not state in terms that the matters therein stated are upon the personal knowledge of the affiant. (2) The falsity of the alleged representations are not stated upon the personal knowledge of the affiant nor does it appear that they are within her personal knowledge, but, on the contrary, are based upon hearsay. (3) The affidavit is vague and indefinite and insufficient to authorize the issuance of the writ. The motion

was denied by the circuit judge and relator seeks by mandamus to vacate the order and compel the granting of the motion.

“The whole question relates to the sufficiency of the affidavit. It sets out in detail the representations that were made. They were all made by defendant to plaintiff personally. After she purchased the business, plaintiff went into possession thereof, and considered it for a month. While the falsity of some of the alleged representations are not stated upon the personal knowledge or within the personal knowledge of the plaintiff, many of them are shown to be within her personal knowledge, and sufficient of them are so made to appear to authorize the issuance of the writ. *Paulus v. Grabben*, 104 Mich. 42, 62 N. W. 160. The affidavit is a very long one, and it would profit no one to set it out in full. A reading of it satisfies us that the circuit judge was right in holding the affidavit showed on its face that plaintiff had personal knowledge of sufficient of the material facts stated in said affidavit to justify the issuance of the writ.”

Fourth. In response to the fourth, eighth, twelfth and sixteenth assignments of error, they being identical, but set forth separately for different plaintiffs in error, defendant in error contends:

1. There is no law requiring that the order of arrest be made only *after* or when a summons has been issued in the action. Section 483, California Code of Civil Procedure, reads:

“The order *may* be made at the time of the issuing of the summons, or any time afterwards before judgment.”

These assignments of error conform to the amended notices of motion of the defendants in the District Court for an order vacating the order of arrest, for in each of said notices this language is used [pp. 153, 155, 158 and 160, Tr. of Rec.], respectively, for the different defendants]:

“IV. That said order of arrest is void, for the reason that at the time said order of arrest was made no summons *had* been issued in said action.”

This ground, which was urged upon the District Court as a reason for vacating the order of arrest, was, and in this court it is insufficient, not warranted by law, and was not and is not a ground for vacating the order of arrest, and the District Court was at liberty, and this court is at liberty, to disregard said ground or reason in considering the motion for an order vacating the order of arrest and in considering the assignments of error herein.

But in addition to this technical, legal reason which renders the assignments of error of no avail in this court, and which made the motion for an order vacating the order of arrest in the District Court of no avail, although sufficient in our judgment to warrant this court in disregarding the fourth, eighth, twelfth and sixteenth assignments of error, and notwithstanding the fact that said assignments of error are technical in their character and might properly be answered by technical objections to their sufficiency, we present for the consideration of the court the further reasons why said assignments of error cannot avail the plaintiffs in error herein:

The statute as above quoted (section 483, California Code of Civil Procedure) says: "The order *may* be made at the time of the issuing of the summons." It becomes necessary to consider what is meant in the statute by the words: "at the time." Certainly it would be a strange construction, as well as a strained construction, to say, as counsel for plaintiffs in error do, that "at the time" means or is equivalent to the words *after the summons has been issued*, or, that an order of arrest issued by the judge a few minutes or a short time before the summons is issued by the clerk would be void. We do not believe that such would be a reasonable construction of the statute. We believe that a reasonable construction of the statute can lead to but one conclusion as to its meaning and that that conclusion should be that the statute contemplates the issuance of the order of arrest at, or about, the time of the commencement of the action by the filing of the complaint, the issuance of the summons and the making of the order of arrest in the usual and ordinary course of business, and according to the usages and practice of the court and the clerk's office with respect to such matters and that whether the order or the summons be physically made out first is a matter of complete indifference. If the two go forth from the clerk's office to the hands of the United States marshal for service upon the defendants at one and the same time, they are made and issued "at the time of," and we are not without authority to the effect that the making of the order and the issuing of the summons do not alone consist of the signing of the order by the judge and the signing of the summons by the clerk, but that

the act or acts of making and issuing comprise as well the delivery of the order and summons, when properly executed and authenticated, for the purpose of service upon the defendants. This delivery of the order of arrest and summons was simultaneous and they were then, and only then, made and issued respectively.

Howe v. Warren, 154 Ill. 247, 40 N. E. 472:

"It is, however, insisted, that 'at the date of the assignment,' means, 'after' the date of the assignment. This construction is, in our judgment, not admissible. In its customary acceptation, the word 'at' is generally understood to mean 'at the time of,'—not before or after,—and expresses the relation of presence and nearness, in either place or time. 'At the date of the assignment' would necessarily mean *at the time when it was in condition to become, but had not in fact become, effective as an assignment under the statute*. We are of opinion it means the rights and duties as they existed when the assignment was made, and that would necessarily mean prior to or up to the date of the assignment becoming operative.' "

Jenks v. State, 39 Ind. 1;

Rick v. Beeler, 90 Tenn. 548, 39 L. R. A. 636;

Dawson v. Daniel, 2 Flip. (U. S.) 305;

Clark v. Kent, Circuit Judge, 125 Mich. 449;

Hunter v. Wetsell, 38 Am. Rep. 544;

County of Los Angeles v. Hannon, 159 Cal. 43;

People v. Blanding, 63 Cal. at page 33.

Harris v. State, *ex rel* Donlan, 33 L. R. A. 92:

"The context in which words and the subject matter in the discussion of which they are used, are the primary tests, where their meaning is sought. This is a case discussing the preposition 'at.' "

It will be observed, also, that while the California Code of Civil Procedure, section 483, says: "The order *may* be made at the time of issuing the summons or any time afterwards before judgment," section 481 of the same Code of Civil Procedure uses this language:

"The order (of arrest) may be made *whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists and that the case is one of those mentioned in section 479.*"

Now, this section (481) has reference to the time when the order may be made just as directly as section 483 does and section 483 uses the word "may" and one will search in vain for any statutory provision forbidding the "making" of the order of arrest before the issuing of the summons.

We are content, however, with our contention that "at the time of," as used in section 483, means, as a part of the acts and things done in commencing the action by the filing of a complaint, the presentation of the affidavit as the basis for the order, the signing of the order by the judge and the issuing of the summons by the clerk and all other things required to be done up to the point of making the order of arrest and the process of the court effective or operative.

And in this connection we are not without authority defining the meaning of "issuing" as applied to summons and other writs, and we believe that the word "made" as used in section 483, Cal. Code Civ. Proc., and as applied to the order of arrest, stands upon the same footing as writs and processes as well defined by authorities.

People, *ex rel* McCallum, v. Gebhard (Mich. 1908), 118 N. W. 16:

“The writ of *capias ad respondendum* was not prematurely issued. The date of a writ is undoubtedly *prima facie* evidence of the time it was actually issued (Howell v. Shepard, 48 Mich. 472, 12 N. W. 661), but a suit is not commenced by writ until the writ is delivered or transmitted to an officer with the *bona fide* intention of having it served (Dedenbach v. City of Detroit, 146 Mich. 710, 110 N. W. 60). That statute (Comp. Laws, Sec. 9998) permit personal actions to be commenced by *capias ad respondendum* in certain cases ‘where an order for bail shall be indorsed on the writ by a judge of the court from which the writ issues, * * * directing the amount in which bail is to be taken.’ The writ is uniform, both a summons addressed to the defendant to appear and defend the suit, and a command, addressed to the sheriff, to take the defendant into custody and keep him until discharged according to law. It is absolutely non-effective as authority to make an arrest until, upon the affidavit of the plaintiff, or some person in his behalf, showing the nature of the plaintiff’s claim (Comp. Laws 9999), the order directing the amount in which bail is to be taken is indorsed ‘upon the writ.’ It is then, and not until then, a warrant to seize the person of the defendant. It is then *issued*, and upon probable cause supported by oath or affirmation. The statute does not require the filing of the affidavit with the clerk as a condition precedent to the issuing of the writ. Exhibiting it to the clerk can accomplish no useful purpose. It must in any event be considered by another and a judicial officer. Johnson v. Morton, 94 Mich. 4, 53 N. W. 816. The point ruled by Baker v. Dubois, 32 Mich. 92; Taylor v. Buck, 100 Mich. 181, 58 N. W. 835, and not by Buckley v. Lowry, 2 Mich. 418. See, also, Clark v.

Kent, Circuit Judge, 125 Mich. 449, 84 N. W. 629. The judgment of the plaintiff against George Schoettle is not void *because the writ was prematurely issued.*”

Dedenbach v. City of Detroit, 146 Mich. 710,
110 N. W. 60.

“ ‘The commencement of suit consists of suing out the summons, and delivering or transmitting it to an officer with the *bona fide* intention of having it served.’ Such is believed to be the rule generally in this country; see Peck v. Ins. Co., *supra*. In Angel on Limitations, Sec. 312, the rule is stated as follows: ‘The general rule appears to be in this country that at the time of suing out the writ the action commences and either when the writ is delivered to the sheriff or to his deputy or when it is sent to either of them, with a *bona fide* intention to be served upon the defendant, *it is considered to have issued.*’ ”

Peck v. Ins. Co., 102 Mich. 52, 60 N. W. 453;

Howell v. Shepard, 12 N. W. 661;

Hancock v. Ritchie, 11 Ind. 48.

Respectfully submitted,

ROBERT L. HUBBARD,

Attorney for Defendant in Error.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

THOMAS R. SHERIDAN,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

TRANSCRIPT OF RECORD

In Error to the District Court of the United States
for the District of Oregon.

Filed

DEC 13 1915

F. D. Monckton,
Clerk.

No. _____

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

THOMAS R. SHERIDAN,

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VS.

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*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

THOMAS R. SHERIDAN,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

Mr. John L. McNab,

Humboldt Bank Building, San Francisco, Cal., and

Mr. Charles W. Fulton,

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For Plaintiff in Error.

Mr. Clarence L. Reames,

United States Attorney, and

Mr. Robert R. Rankin,

Assistant United States Attorney, Postoffice
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For the Defendant in Error.

*In the District Court of the United States, for the
District of Oregon.*

UNITED STATES OF AMERICA,

Plaintiff,

VS.

THOMAS R. SHERIDAN,

Defendant.

CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA, ss.

The President of the United States of America, to the
United States of America, and to Clarence L.
Reames, United States Attorney for the District of
Oregon.

Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the District of Oregon, wherein Thomas R. Sheridan is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered

against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 26th day of October, in the year of our Lord one thousand nine hundred and fifteen.

R. S. BEAN,
United States District Judge.

Attest:

G. H. MARSH
.....

Clerk of the District Court of the United States for the
District of Oregon.

Due and legal service of the above and foregoing citation, and receipt of a copy thereof, is hereby accepted and admitted, in the City of Portland, State of Oregon, this 25th day of October, 1915.

CLARENCE L. REAMES,
United States Attorney.

Filed October 26, 1915. G. H. Marsh, Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS R. SHERIDAN,

Defendant.

WRIT OF ERROR.

UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the
Honorable, the Judge of the District Court of the
United States for the District of Oregon.

Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in the
said District Court, before the Honorable Frank H.
Rudkin, United States District Judge, between the
United States of America, plaintiff and defendant in
error, and Thomas R. Sheridan, defendant and plain-
tiff in error, a manifest error hath happened, to the great
damage of the said plaintiff in error as by his complaint
appears:

We being willing that error, if any hath been, should
be duly corrected, and full and speedy justice done to
the parties aforesaid in this behalf, do command you,

if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

(Seal)

G. H. MARSH,
Clerk, U. S. District Court for the District of Oregon.

Service of the above Writ of Error made this 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen, upon the District Court of the United States, for the District of Oregon, by filing with me as Clerk of said Court, a duly certified copy of said Writ of Error.

G. H. MARSH,
Clerk of the District Court of the United States for the
District of Oregon.

Filed October 26, 1915. G. H. Marsh, Clerk,
United States District Court, District of Oregon.

*In the District Court of the United States for the
District of Oregon.*

NOVEMBER TERM, 1913.

BE IT REMEMBERED, That on the 28th day of February, 1914, there was duly filed in the District Court of the United States for the District of Oregon, an Indictment, in words and figures as follows, to wit:

*In the District Court of the United States for the
District of Oregon.*

INDICTMENT.

UNITED STATES OF AMERICA,

vs.

THOMAS R. SHERIDAN,

Defendant.

Indictment for Violation of Section 5209, U. S. Revised
Statutes.

United States of America,
District of Oregon,—ss.

In the Honorable United States District Court for the District of Oregon, sitting at and in the City of Portland, within said district, at its regular November Term, A. D. 1913-1914;

In the name and by the authority of the United States of America, comes now the grand jury of the

United States of America and of the District of Oregon, and being first duly selected, empaneled, sworn and charged to inquire concerning the commission of crimes within and for said district, upon their oaths and affirmations, in open court, do find, charge, allege and present:

COUNT ONE.

That Thomas R. Sheridan, the above named defendant, heretofore to wit, on the 7th day of March, 1911, in the County of Douglas, within the State and District of Oregon, and within the jurisdiction of this Court, was then and there President of a certain National Banking Association, to wit: The First National Bank of Roseburg, Oregon, theretofore duly organized and established and then and there existing and doing business at the City of Roseburg, in the County of Douglas, within the state and district aforesaid, under the laws of the United States, and that he, the said Thomas R. Sheridan, so then and there on the date last above mentioned being such president, did then and there at the said City of Roseburg, County of Douglas, in the State and District of Oregon, on to wit: the 7th day of March, A. D. 1911, wilfully and unlawfully abstract and convert and cause to be abstracted and converted to his, the said Thomas R. Sheridan's own use, benefit and advantage, and to the use, benefit and advantage of one B. C. Agee, certain moneys, funds and credits of said National Banking Association, of the amount and value of Two Hundred and Thirty (\$230.00) Dollars, a more particular description of which is to this grand jury unknown, from and out of the moneys, funds and

credits of said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of one David Hull, a depositor and creditor of said The First National Bank of Roseburg, by means of a certain instrument designated as a memorandum check, without the knowledge and consent of said National Banking Association, and with the intent then and there on the part of him, the said Thomas R. Sheridan, to injure and defraud the said National Banking Association and said depositor and creditor therein;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT TWO.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

That Thomas R. Sheridan, the above named defendant, heretofore, to wit: On the 22d day of March, 1911, in the County of Douglas, within the State and District of Oregon, and within the jurisdiction of this Court, was then and there President of a certain National Banking Association, to wit: The First National Bank of Roseburg, Oregon, theretofore duly organized and established and then and there existing and doing business at the City of Roseburg, in the County of Douglas, within the state and district aforesaid, under the laws of the United States, and that he, the said Thomas R. Sheridan, so then and there on the date last above men-

tioned being such president, did then and there at said City of Roseburg, County of Douglas, in the State and District of Oregon, on to wit: the 22d day of March, A. D. 1911, wilfully and unlawfully abstract and convert and cause to be abstracted and converted to his, the said Thomas R. Sheridan's own use, benefit and advantage, and to the use, benefit and advantage of one W. P. Reed, certain moneys, funds and credits of said National Banking Association, of the amount and value of Five Hundred and Thirty (\$530.00) Dollars, a more particular description of which is to this grand jury unknown, from and out of the moneys, funds and credits of said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of one M. S. Doerstler, a depositor and creditor of said The First National Bank of Roseburg, by means of a certain instrument designated as a memorandum check, without the knowledge and consent of said banking association, and with the intent then and there on the part of him, the said Thomas R. Sheridan, to injure and defraud the said National Banking Association, and said depositor and creditor therein;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT THREE.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

That Thomas R. Sheridan, the above named defendant, heretofore, to wit: On the 7th day of April, 1911, in the County of Douglas, within the State and District of Oregon and within the jurisdiction of this Court, was then and there president of a certain National Banking Association, to wit: The First National Bank of Roseburg, Oregon, theretofore duly organized and established and then and there existing and doing business at the City of Roseburg, in the County of Douglas, within the state and district aforesaid, under the laws of the United States, and that he, the said Thomas R. Sheridan, so then and there on the date last above mentioned being such president, did then and there at the said City of Roseburg, County of Douglas, in the State and District of Oregon, on to wit: the 7th day of April, 1911, wilfully and unlawfully abstract and convert and cause to be abstracted and converted to his, the said Thomas R. Sheridan's own use, benefit and advantage, certain moneys, funds and credits of said National Banking Association, of the amount and value of one Thousand (\$1,000) Dollars, a more particular description of which is to this grand jury unknown, from and out of the moneys, funds and credits of said National Banking Association, held by the said National Banking Association as a deposit for the sole use and benefit of one W. J. Carlon, a depositor and creditor of said The First National Bank of Roseburg, by means of a certain instrument designated as a memorandum check, without the knowledge and consent of said National Banking Association, and with the intent then and there on the part of him, the said Thomas R. Sheridan, to

injure and defraud the said National Banking Association and said depositor and creditor therein;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT FOUR.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

That Thomas R. Sheridan, the above named defendant, heretofore, to wit: On the 15th day of April, 1911, in the County of Douglas, within the State and District of Oregon and within the jurisdiction of this Court, was then and there president of a certain National Banking Association, to wit: The First National Bank of Roseburg, Oregon, theretofore duly organized and established and then and there existing and doing business at the City of Roseburg, in the County of Douglas, within the state and district aforesaid, under the laws of the United States, and that he, the said Thomas R. Sheridan, so then and there on the date last above mentioned, being such president, did then and there at the said City of Roseburg, County of Douglas, in the State and District of Oregon, on, to wit: the 15th day of April, 1911, wilfully and unlawfully abstract and convert and cause to be abstracted and converted to his, the said Thomas R. Sheridan's own use, benefit and advantage, certain moneys, funds and credits of said

National Banking Association, of the amount and value of Five Thousand (\$5,000) Dollars, a more particular description of which is to this grand jury unknown, from and out of the moneys, funds and credits of said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of one Laura M. Verrill, a depositor and creditor of said The First National Bank of Roseburg, by means of a certain instrument designated as a memorandum check, without the knowledge and consent of said National Banking Association, and with the intent then and there on the part of him, the said Thomas R. Sheridan, to injure and defraud the said National Banking Association and said depositor and creditor therein;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT FIVE.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

That Thomas R. Sheridan, the above named defendant, heretofore, to wit: On the 27th day of April, 1911, in the County of Douglas, within the State and District of Oregon, and within the jurisdiction of this Court, was then and there president of a certain National Banking Association, to wit: The First National Bank of Roseburg, Oregon, theretofore duly organized and es-

tablished and then and there existing and doing business at the City of Roseburg, in the County of Douglas, within the state and district aforesaid, under the laws of the United States, and that he, the said Thomas R. Sheridan, so then and there on the date last above mentioned being such president, did then and there at the said City of Roseburg, County of Douglas, in the State and District of Oregon, on, to wit: the 27th day of April, A. D. 1911, wilfully and unlawfully abstract and convert and cause to be abstracted and converted to his, the said Thomas R. Sheridan's own use, benefit and advantage, certain moneys, funds and credits of said National Banking Association, of the amount and value of Five Hundred (\$500.00) Dollars, a more particular description of which is to this grand jury unknown, from and out of the moneys, funds and credits of said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of one W. J. Carlon, a depositor and creditor of said The First National Bank of Roseburg, by means of a certain instrument designated as a memorandum check, without the knowledge and consent of said National Banking Association, and with the intent then and there on the part of him, the said Thomas R. Sheridan, to injure and defraud the said National Banking Association and said depositor and creditor therein;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT SIX.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

That Thomas R. Sheridan, the above named defendant, heretofore, to wit: On the 27th day of April, 1911, in the County of Douglas, within the State and District of Oregon, and within the jurisdiction of this Court, was then and there president of a certain National Banking Association, to wit: The First National Bank of Roseburg, Oregon, theretofore duly organized and established and then and there existing and doing business at the City of Roseburg, in the County of Douglas, within the state and district aforesaid, under the laws of the United States, and that he, the said Thomas R. Sheridan, so then and there on the date last above mentioned being such president, did then and there at the said City of Roseburg, County of Douglas, in the State and District of Oregon, on, to wit: The 27th day of April, A. D. 1911, wilfully and unlawfully abstract and convert and cause to be abstracted and converted to his, the said Thomas R. Sheridan's own use, benefit and advantage, certain moneys, funds and credits of said National Banking Association, of the amount and value of Two Hundred and Sixty (\$260.00) Dollars, a more particular description of which is to this grand jury unknown, from and out of the moneys, funds and credits of said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of one M. S. Doerstler, a depos-

itor and creditor of said The First National Bank of Roseburg, by means of a certain instrument designated as a memorandum check, without the knowledge and consent of said banking association, and with the intent then and there on the part of him, the said Thomas R. Sheridan, to injure and defraud the said National Banking Association and said depositor and creditor therein;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT SEVEN.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

That Thomas R. Sheridan, the above named defendant, heretofore, on, to wit: the 24th day of May, 1911, in the County of Douglas, within the State and District of Oregon, and within the jurisdiction of this Court, was then and there president of a certain National Banking Association, to wit: The First National Bank of Roseburg, Oregon, theretofore duly organized and established and then and there existing and doing business at the City of Roseburg, in the County of Douglas, within the state and district aforesaid, under the laws of the United States, and that he, the said Thomas R. Sheridan, so then and there on the date last above mentioned being such president, did then and there at the said City of Roseburg, County of Douglas,

in the State and District of Oregon, on, to wit: the 24th day of May, A. D. 1911, wilfully and unlawfully abstract and convert and cause to be abstracted and converted to his, the said Thomas R. Sheridan's own use, benefit and advantage, certain moneys, funds and credits of said National Banking Association, of the amount and value of Five Thousand Five Hundred (\$5,500.00) Dollars, a more particular description of which is to this grand jury unknown, from and out of the moneys, funds and credits of said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of one J. E. Haney, a depositor and creditor of said The First National Bank of Roseburg, by means of a certain instrument designated as a memorandum check, without the knowledge and consent of said National Banking Association, and with the intent then and there on the part of him, the said Thomas R. Sheridan, to injure and defraud the said National Banking Association and said depositor and creditor therein;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT EIGHT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

That Thomas R. Sheridan, the above named defendant, heretofore, to wit: On the 29th day of May, 1911,

in the County of Douglas, within the State and District of Oregon, and within the jurisdiction of this Court, was then and there president of a certain National Banking Association, to wit: The First National Bank of Roseburg, Oregon, theretofore duly organized and established and then and there existing and doing business at the City of Roseburg, in the County of Douglas, within the state and district aforesaid, under the laws of the United States, and that he, the said Thomas R. Sheridan, so then and there on the date last above mentioned being such president, did then and there at the said City of Roseburg, County of Douglas, in the State and District of Oregon, on, to wit: the 29th day of May, A. D. 1911, wilfully and unlawfully abstract and convert and cause to be abstracted and converted to his, the said Thomas R. Sheridan's own use, benefit and advantage, certain moneys, funds and credits of said National Banking Association, of the amount and value of Five Thousand (\$5,000) Dollars, a more particular description of which is to this grand jury unknown, from and out of the moneys, funds and credits of said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of one C. E. Marks, a depositor and creditor of said The First National Bank of Roseburg, Oregon, by means of a certain instrument designated as a memorandum check, without the knowledge and consent of said National Banking Association, and with the intent then and there on the part of him, the said Thomas R. Sheridan, to injure and defraud the said National Banking Association and said depositor and creditor therein;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 21st day of February, 1914.

A TRUE BILL.

(Signed) D. L. KEYT,
Foreman U. S. Grand Jury.

(Signed) ROBERT R. RANKIN,
Assistant U. S. Attorney.

Witnesses sworn and examined before said United States Grand Jury:

S. A. Sanford.

C. E. Marks.

A. M. Kelsey.

B. C. Agee.

W. J. Carlon.

M. S. Doerstler.

E. E. Haines.

David Hull.

H. P. Marks.

C. J. Marks.

E. P. Preble.

Laura M. Verrill.

J. E. Haney.

Thomas R. Sheridan (at his own request).

Miles Agee.

W. E. Chapman.
Mrs. W. T. De War.
Mrs. T. D. Barry.
J. F. Hoover.
Dr. H. Little.
G. P. McNamee.
E. C. Marks.
Nettie Scranton.
Mrs. Anna E. Carroll.
Mrs. John Byron.

Endorsed: A True Bill.

D. L. KEYT,
Foreman Grand Jury.

Filed February 28, 1914. A. M. Cannon, Clerk.

And afterwards, to wit: On Wednesday, the 4th day of March, 1914, the same being the 3d judicial day of the regular March term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

RECORD OF ARRAIGNMENT.

Now, at this day come the plaintiff by Mr. Robert R. Rankin, Assistant United States Attorney, and the defendant in his own proper person, and by Mr. Charles W. Fulton, of counsel: Whereupon said defendant is duly arraigned upon the indictment herein, and on

motion of said defendant it is hereby ordered that he be allowed until March 16, 1914, in which to plead to said indictment.

And afterwards, to wit: On the 13th day of March, 1915, there was duly filed in said Court, and cause a Demurrer to Indictment, in words and figures as follows, to wit:

DEMURRER.

And the said Thomas R. Sheridan, defendant in the above entitled cause, in his own proper person, comes into court here, and having heard the indictment in said cause against him read, says:

1. That as to Count One of said indictment and the matters therein contained, in manner and form as the same are stated and set forth in said indictment, are not sufficient in law, and that he, the said Thomas R. Sheridan, is not bound by the law of the land to answer the same; and this he is ready to verify.

2. That as to Count Two of said indictment and the matters therein contained, in manner and form as the same are stated and set forth in said indictment, are not sufficient in law, and that he, the said Thomas R. Sheridan, is not bound by the law of the land to answer the same; and this he is ready to verify.

3. That as to Count Three of said indictment and the matters therein contained, in manner and form as

the same are stated and set forth in said indictment, are not sufficient in law, and that he, the said Thomas R. Sheridan, is not bound by the law of the land to answer the same; and this he is ready to verify.

4. That as to Count Four of said indictment and the matters therein contained, in manner and form as the same are stated and set forth in said indictment, are not sufficient in law, and that he, the said Thomas R. Sheridan, is not bound by the law of the land to answer the same; and this he is ready to verify.

5. That as to Count Five of said indictment and the matters therein contained, in manner and form as the same are stated and set forth in said indictment, are not sufficient in law, and that he, the said Thomas R. Sheridan, is not bound by the law of the land to answer the same; and this he is ready to verify.

6. That as to Count Six of said indictment and the matters therein contained, in manner and form as the same are stated and set forth in said indictment, are not sufficient in law, and that he, the said Thomas R. Sheridan, is not bound by the law of the land to answer the same; and this he is ready to verify.

7. That as to Count Seven of said indictment and the matters therein contained, in manner and form as the same are stated and set forth in said indictment, are not sufficient in law, and that he, the said Thomas R. Sheridan, is not bound by the law of the land to answer the same; and this he is ready to verify.

8. That as to Count Eight of said indictment and the matters therein contained, in manner and form as the same are stated and set forth in said indictment, are not sufficient in law, and that he, the said Thomas R. Sheridan, is not bound by the law of the land to answer the same; and this he is ready to verify.

WHEREFORE, For want of a sufficient indictment in this behalf, the said Thomas R. Sheridan prays judgment and that by the Court he may be dismissed and discharged from the said premises in the said indictment specified.

FULTON & BOWERMAN,
Attorneys for defendant.

State of Oregon,
County of Multnomah,—ss.

Due service of the within Demurrer by the delivery of a duly certified copy thereof as provided by law, at Portland, Oregon, on this 10th day of March, 1915, is hereby admitted.

CLARENCE L. REAMES,
Of Attorneys for Plaintiff.

Filed March 13, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 15th day of March, 1914, the same being the 13th judicial day of the regular March term of said Court; present: the Honorable Frank H. Rudkin, United States District Judge for the Eastern District of Washington, presid-

ing, the following proceedings were had in said cause, to wit:

ORDER OVERRULING DEMURRER AND RECORD OF PLEA.

This cause was heard upon the demurrer of the defendant to the indictment herein, and was argued by Mr. Clarence L. Reames, United States Attorney, and by Mr. Robert R. Rankin, Assistant United States Attorney, and by Mr. Charles W. Fulton, of counsel for said defendant. Upon consideration whereof, it is ordered and adjudged that said demurrer be, and the same is hereby overruled, and that said defendant be allowed an exception to this ruling. And thereupon said defendant for plea to the indictment herein, says he is not guilty.

And afterwards, to-wit, on Monday, the 22d day of March, 1915, the same being the 19th judicial day of the regular March term of said Court; present, the Honorable Frank H. Rudkin, United States District Judge for the Eastern District of Washington, presiding, the following proceedings were had in said cause, to-wit:

RECORD OF EMPANELING JURY AND TRIAL.

Now, at this day, come the plaintiff, by Mr. Clarence L. Reames, United States Attorney, and Mr. Robert R. Rankin, Assistant United States Attorney, and the

defendant in his own proper person and by Mr. Charles W. Fulton, Mr. J. W. Bennett and Mr. Elbert B. Hermann of counsel, whereupon this being the time set for the trial of this cause, now come the following named jurors to try the issues joined: James Guttridge, Otto W. Nelson, Robert Johnson, Alex Schick, James Horn, Wm. J. Good, B. M. Hamilton, Howard R. Ewing, C. C. Huff, R. L. Donald, George Thyng and Geo. Perkins, twelve good and lawful men of the district, who being duly accepted by both parties, are duly impaneled and sworn, and the hour of adjournment having arrived, further trial of this cause is continued until tomorrow, Tuesday, March 23, 1915.

And afterwards, to-wit, on Tuesday, the 23d day of March, 1915, the same being the 20th judicial day of the regular March term of said Court; present, the Honorable Frank H. Rudkin, United States District Judge for the Eastern District of Washington, presiding, the following proceedings were had in said cause, to-wit:

RECORD OF TRIAL.

Now, at this day, come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and Mr. Robert R. Rankin, Assistant United States Attorney, and the defendant in his own proper person and by his counsel as of yesterday, and the jury impaneled herein being present and answering to their names, the trial of this cause is resumed, and the jury having heard the evidence adduced, and the hour of adjournment having arrived,

and further trial of this cause is continued until tomorrow, Wednesday, March 24, 1915.

And afterwards, to-wit, on Wednesday, the 24th day of March, 1915, the same being the 21st judicial day of the regular March term of said Court; present, the Honorable Frank H. Rudkin, United States District Judge for the Eastern District of Washington, presiding, the following proceedings were had in said cause, to-wit:

RECORD OF TRIAL.

Now, at this day, come the plaintiff, by Mr. Clarence L. Reames, United States Attorney, and Mr. Robert R. Rankin, Assistant United States Attorney, and the defendant in his own proper person and by his counsel as of yesterday, and the jury impaneled herein being present and answering to their names, the trial of this cause is resumed. And the jury having heard the evidence adduced, and the hour of adjournment having arrived, further trial of this cause is continued until tomorrow, Thursday, March 25, 1915.

And afterwards, to-wit, on Thursday, the 25th day of March, 1915, the same being the 22d judicial day of the regular March term of said Court; present, the Honorable Frank H. Rudkin, United States District Judge for the Eastern District of Washington, presiding, the following proceedings were had in said cause, to-wit:

RECORD OF TRIAL.

Now, at this day, come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and the defendant in his own proper person and by his counsel as of yesterday, and the jury impaneled herein being present and answering to their names, the trial of this cause is resumed. And the jury having heard the evidence adduced, and the hour of adjournment having arrived, further trial of this cause is continued until tomorrow, Friday, March 26, 1915.

And afterwards, to-wit, on Friday, the 26th day of March, 1915, the same being the 23d judicial day of the regular March term of said Court; present, the Honorable Frank H. Rudkin, United States District Judge for the Eastern District of Washington, presiding, the following proceedings were had in said cause, to-wit:

RECORD OF TRIAL.

Now, at this day, come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and Mr. Robert R. Rankin, Assistant United States Attorney, and the defendant in his own proper person and by his counsel as of yesterday, and the jury impaneled herein being present and answering to their names, the trial of this cause is resumed. And the jury having heard the evidence adduced, and the hour of adjournment having arrived, further trial of this cause is continued until Monday, March 29, 1915.

And afterwards, to-wit, on Monday, the 29th day of March, 1915, the same being the 25th judicial day of the regular March term of said Court; present, the Honorable Frank H. Rudkin, United States District Judge for the Eastern District of Washington, presiding, the following proceedings were had in said cause, to-wit:

RECORD OF TRIAL.

Now, at this day, come the plaintiff, by Mr. Clarence L. Reames, United States Attorney, and Mr. Robert R. Rankin, Assistant United States Attorney, and the defendant in his own proper person and by his counsel as of Friday, and the jury impaneled herein being present and answering to their names, the trial of this cause is resumed. And said jury having heard the evidence adduced, the arguments of counsel, and the charge of the Court, retire in charge of proper sworn officers to consider of their verdict.

And afterwards, to wit, on Tuesday, the 30th day of March, 1915, the same being the 26th judicial day of the regular March term of said Court; present: the Honorable Frank H. Rudkin, United States District Judge for the Eastern District of Washington, presiding, the following proceedings were had in said cause, to wit:

RECORD OF TRIAL AND VERDICT.

Now, at this day comes the plaintiff by Mr. Clarence L. Reames, United States Attorney, and Mr.

Robert R. Rankin, Assistant United States Attorney, and the defendant in his own proper person and by his counsel as of yesterday, whereupon the jury impaneled herein come into court and answer to their names, and return into court the following verdict, viz.: "We, the jury, duly impaneled and sworn to try the above entitled criminal cause, find the above named defendant, Thomas R. Sheridan,

Guilty in manner and form as charged in Count One of the indictment; and Not Guilty in manner and form as charged in Count Two of the indictment; and Not Guilty in manner and form as charged in Count Three of the indictment; and Guilty in manner and form as charged in Count Four of the indictment; and Not Guilty in manner and form as charged in Count Five of the indictment; and Not Guilty in manner and form as charged in Count Six of the indictment; and Not Guilty in manner and form as charged in Count Seven of the indictment; and Not Guilty in manner and form as charged in Count Eight of the indictment. Dated at Portland, Oregon, this 30th day of March, 1915, R. L. Donald, Foreman of the Jury." Whereupon, on motion of said defendant, it is ordered that said jury be polled and thereupon each of said jurors in answer to his name says that the said verdict is his verdict. Whereupon it is ordered that said verdict be received and filed; and on motion of said defendant, it is ordered that he be and hereby is allowed 30 days from this date in which to file a motion for a new trial herein and to file a motion in arrest of judgment.

And afterwards, to wit, on the 30th day of March, 1915, there was duly filed in said Court and cause verdict, in words and figures as follows, to wit:

VERDICT.

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA

v.

THOMAS R. SHERIDAN,

Defendant.

VERDICT OF JURY.

We, the jury, duly impaneled and sworn to try the above entitled criminal cause, find the above named defendant, Thomas R. Sheridan,

Guilty in manner and form as charged in Count One of the indictment; and

Not Guilty in manner and form as charged in Count Two of the indictment; and

Not Guilty in manner and form as charged in Count Three of the indictment; and

Guilty in manner and form as charged in Count Four of the indictment; and

Not Guilty in manner and form as charged in Count Five of the indictment; and

Not Guilty in manner and form as charged in Count Six of the indictment; and

Not Guilty in manner and form as charged in Count Seven of the indictment; and

Not Guilty in manner and form as charged in Count Eight of the indictment.

Dated at Portland, Oregon, this 30th day of March, 1915.

R. L. DONALD,
Foreman of the Jury.

Filed March 30, 1915, G. H. Marsh, Clerk.

And afterwards, to wit, on the 12th day of April, 1915, there was duly filed in said Court and cause, motion in arrest of judgment and for a new trial, in words and figures as follows, to wit:

**MOTION IN ARREST OF JUDGMENT:
MOTION FOR NEW TRIAL.**

Comes now Thomas R. Sheridan, the defendant in the above entitled cause, and the jury in said cause having heretofore returned a verdict finding said Thomas R. Sheridan guilty on Counts numbered One and Four of the indictment herein, the said defendant, Thomas R. Sheridan, now moves the Court in arrest of judgment and for a new trial, as follows:

I.

The defendant aforesaid represents and shows to the Court that Count One of said indictment does not state facts sufficient to constitute a crime, and does not

charge this defendant with any offense against the laws of the United States, and therefore this defendant moves the Court in arrest of judgment on said Count One.

II.

The defendant aforesaid represents and shows to the Court that Count Four of said indictment does not state facts sufficient to constitute a crime, and does not charge this defendant with any offense against the laws of the United States, and therefore this defendant moves the Court in arrest of judgment on said Count Four.

III.

If the motion of the said defendant aforesaid, in arrest of judgment, be not allowed as to said Count One of said indictment, then this defendant moves the Court to set aside the verdict of the jury aforesaid, finding this defendant guilty as charged in said Count One, for the following reasons:

(1) The evidence was insufficient to justify the verdict, and the verdict was against the great weight and preponderance of the evidence;

(2) That at the trial of said cause the Court erred in admitting evidence against the defendant, objected to by the defendant, and to which rulings of the Court the defendant, in each instance, then and there excepted, and his exception was allowed;

(3) The Court erred in refusing to instruct the jury as requested by the defendant at the trial of said

cause; and to such refusal of the Court, in each instance, the defendant excepted and his exception was allowed by the Court.

IV.

If the motion of the said defendant aforesaid, in arrest of judgment, be not allowed as to said Count Four of said indictment, then this defendant moves the Court to set aside the verdict of the jury aforesaid, finding this defendant guilty as charged in said Count Four, for the following reasons:

(1) The evidence was insufficient to justify the verdict, and the verdict was against the great weight and preponderance of the evidence;

(2) That at the trial of said cause the Court erred in admitting evidence against the defendant, objected to by the defendant, and to which rulings of the Court the defendant, in each instance, then and there excepted, and his exception was allowed;

(3) The Court erred in refusing to instruct the jury as requested by the defendant at the trial of said cause; and to such refusal of the Court, in each instance, the defendant excepted and his exception was allowed by the Court.

FULTON & BOWERMAN,

Attorneys for Defendant.

State of Oregon

County of Multnomah—ss.

Due service of the within motion by the delivery of a duly certified copy thereof as provided by law, at

Portland, Oregon, on this April 12th, 1915, is hereby admitted.

JOHN J. BECKMAN,
Of Attorneys for Complainant.

Filed April 12, 1915, G. H. Marsh, Clerk.

And afterwards, to-wit, on Friday, the 30th day of April, 1915, the same being the 54th judicial day of the regular March term of said Court; Present: the Honorable Frank H. Rudkin, United States District Judge for the Eastern District of Washington, presiding, the following proceedings were had in said cause, to-wit:

ORDER DENYING MOTION IN ARREST OF
JUDGMENT AND FOR NEW TRIAL.
RECORD OF SENTENCE.

Now, at this day, come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and Mr. Robert R. Rankin, Assistant United States Attorney, and the defendant in his own proper person and by Mr. C. W. Fulton of counsel, whereupon this cause comes on to be heard upon the motion of the said defendant in arrest of judgment and for a new trial herein, and the Court having heard the arguments of counsel, it is ordered and adjudged that said motions be, and the same are hereby denied; whereupon on motion of said plaintiff for judgment upon the verdict of the jury heretofore returned herein, it is considered that said

defendant be imprisoned in the United States Penitentiary at McNeils Island, Washington, for the term of five (5) years as to each of the two counts in said indictment upon which said defendant was found guilty and that these sentences run concurrently; it is further ordered that said defendant stand committed until this sentence be performed or until he be discharged according to law. Whereupon on motion of said defendant, it is ordered that he be and is hereby allowed ninety days within which to submit a bill of exceptions herein and it is further ordered that said defendant give a supersedeas bond in the sum of \$6000.00 and that upon the filing of said bond, execution of sentence herein be stayed.

And afterwards, to wit, on the 25th day of October, 1915, there was duly filed in said Court and cause a Bill of Exceptions in words and figures as follows, to wit:

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that upon the 21st day of February, 1914, an indictment was returned in the above-entitled Court, charging the defendant, Thomas R. Sheridan, with having violated Section 5209 of the Revised Statutes of the United States.

That thereafter said defendant interposed a demurrer to the said indictment.

Thereafter said demurrer was by the Court overruled, to which ruling and decision of the Court said

defendant by his Attorneys then and there excepted; and his exception was allowed.

BE IT FURTHER REMEMBERED, that on the 23rd day of March, A. D. 1915, at a stated term of the District Court of the United States for the District of Oregon, the above-entitled cause came on duly and regularly for trial before the Honorable Frank H. Rudkin, United States District Judge; the United States appearing by Mr. Clarence L. Reames, United States Attorney for said District of Oregon, and Mr. R. R. Rankin, Assistant United States Attorney for said District of Oregon; and the defendant Thomas R. Sheridan appearing in person and by Messrs. C. W. Fulton, J. R. Bennett, and Elbert Hermann, his Attorneys.

Thereupon a jury was regularly empaneled and sworn according to law, and opening statements having been made to the jury by counsel for the United States and for the defendant, respectively, the evidence hereinafter following was introduced and the following proceedings occurred.

As a part of the case of the government, and during the progress of the trial, the government introduced in evidence the following exhibits, which bear the following respective exhibit numbers:

GOVERNMENT'S EXHIBITS.

Exhibit No. Character of Document.

1. Charter 1st Nat'l Bank of Roseburg, Oregon.

2. Note 3/2/06 to David Hull, \$512.50.
3. Memorandum check, David Hull, \$800.
4. Memorandum check, David Hull, \$230.
5. Minute Book 1st Nat'l Bank, Roseburg, Oregon.
6. Note 3/4/11 to David Hull, \$230.
7. Deposit slip 3/4/11, Hull, \$230.
8. Letter, Sheridan to Mrs. Verrell, 4/6/11.
9. Memorandum check, 4/15/11, Mrs. Verrell, \$5,000.
10. Note, 4/15/11, Sheridan to Mrs. Verrell, \$5,000.
11. Memorandum check, Carlon, 4/7/11, \$1,000.
12. Note, Sheridan to Carlon, 4/7/11, \$1,000.
13. Memorandum check, 4/27/11, Carlon, \$500.
14. Note, Sheridan to Carlon, 4/27/11, \$500.
15. Memorandum check, Haney, 5/24/11, \$5,000.
16. Note, Sheridan to Haney, 5/24/11, \$5,000.
17. Memorandum check, 1/18/11, \$600. Chapman.
18. Memorandum check, 3/22/11, \$530. Doerstler.
19. Memorandum check, 4/27/11, \$260. Doerstler.
20. Note, Sheridan to Doerstler, \$260, 4/27/11.
21. Memorandum check, 5/8/08, \$1,000, Doerstler.
22. Note, Sheridan to Doerstler, \$1,000, 5/8/08.
23. Memorandum check, Doerstler, 5/1/08, \$469.
24. Note, Agee to Doerstler, 5/1/08.
25. Note, Sheridan to Doerstler, 3/30/09, \$500.
26. Memorandum check, 5/10/10, Doerstler, \$1,700.
27. Note, Kelsay to Doerstler, 5/10/10, \$700.
28. Note Sheridan to Doerstler, 5/5/10, \$1,000.
29. Note Kelsay to Doerstler, 10/6/09, \$1,000.
30. Deposit slip, credit Agee, \$469, 5/1/08.
31. Deposit slip, credit Kelsay, \$1,000, 10/6/09.

32. Memorandum check, 7/27/08, Marks, \$2,000.
33. Note, Sheridan to Marks, 7/27/08, \$2,000.
34. Memorandum check, 2/23/10, Marks, \$500.
35. Note, Sheridan to Marks, 2/23/10, \$500.
36. Note, Sheridan to Marks, 5/20/11, \$5,000.
37. Memorandum check, 8/10/09, H. P. Marks, \$745.
38. Note, Kelsay to H. P. Marks, 8/10/09, \$745.
39. Memorandum check, 1/25/10, H. P. Marks, \$540.32.
40. Note, Kelsay to H. P. Marks, 1/25/10, \$540.32.
41. Memorandum check, 1/25/10, C. J. Marks, \$500.
42. Note, Sheridan to C. P. Marks, 1/25/10, \$500.
43. Memorandum check, 2/6/11, C. J. Marks, \$800.
44. Note to C. J. Marks, 2/6/11, \$800.
- 44¹/₂. Memorandum check, 6/29/07, E. C. Marks, \$300.
45. Note, Agee to E. C. Marks, 6/29/07, \$300.
46. Memorandum check, 8/10/09, E. C. Marks, \$300.
47. Note, Kelsay to Marks, 8/10/09, \$300.
48. Memorandum check, 1/29/10, E. C. Marks, \$937.52.
49. Note, Sheridan to E. C. Marks, 1/29/10, \$937.52.
50. Memorandum check, 12/13/10, Marks Bros., \$3,000.
51. Note, Sheridan to Marks Bros., 12/3/10, \$3,000.
52. Memorandum check, 4/6/08, Haines, \$2,000.
53. Note, 4/6/08, to Haines, \$2,000.
54. Note, 11/26/09, Kelsay to DeWar, \$3,000.
55. Letter, Sheridan to DeWar, 12/21/09.
56. Memorandum check, Mrs. T. D. Barry, 6/28/09, \$1,000.

57. Memorandum check, Mrs. T. D. Barry, 8/29/08, \$2,000.
58. Promissory note, 12/15/09, Sheridan to Barry, \$3,000.
59. Memorandum check, 3/18/10, Mrs. Barry, \$500.
60. Note, Kelsay to Barry, 3/18/10, \$500.
61. Memorandum check, 11/28/10, \$1,000, Barry.
62. Note, Sheridan to Barry, 11/28/10, \$1,000.
63. Letter, Cooley to Sheridan, 6/4/09.
64. Note, Sheridan to Cooley, 1/2/08.
65. Note, Sheridan to Cooley, 1/7/09.
66. Letter, Sheridan to McNamee, 7/23/09.
67. Letter, McNamee to Sheridan, 2/3/11.
68. Letter, Sheridan to McNamee, 2/8/11.
69. Memorandum check 2/9/11, McNamee, \$2,956.60.
70. Note, Sheridan to McNamee, 2/9/11, \$2,956.60.
71. Letter, Sheridan to McNamee, 6/18/12.
72. Memorandum check, 2/21/10, Preble, \$3,000.
73. Note, Servia to Preble, 2/8/10, \$3,000.
74. Memorandum check, 2/24/11, Mosthaf, \$800.
75. Note, Sheridan to Mosthaf, 2/22/11, \$800.
76. Memorandum check, 2/17/09, Wende, \$1169.
77. Note, 2/17/09, to Wende, \$1,010.
78. Memorandum check, Mrs. Byron, \$1,080.25.
79. Memorandum check, 1/23/09, Hoover, \$2,500.

As a part of the defense of the defendant he introduced in evidence during the cross-examination of the several witnesses of the government, the following exhibits:

Exhibit No. Character of Document.

1. Release, David Hull.
2. Bank Book, David Hull.
3. Release, Mrs. Verrell.
4. Letter, Verrell to Sheridan.
5. Letter, Verrell to Sheridan.
6. Deposition of Haney.
7. (a) Bank statements, Doerstler.
7. (b) Bank statements, Doerstler.
7. (c) Bank statements, Doerstler.
8. Release, C. J. Marks.
9. Release, E. C. Marks.
10. Release, Marks Bros.
11. Letter, H. P. Marks to Sheridan, 11/16/12.
12. Bank Book, Marks Bros.
13. Release, McNamee.
14. Release, Mrs. Barry.
15. Release, Mosthaf.
16. Letter, Mosthaf to Sheridan, 3/4/12.
17. Letter, Mosthaf to Sheridan, 10/5/12.
18. Letter, Mosthaf to Sheridan, 11/11/12.
19. Release, Wende.
20. Letter, Byron to Sheridan, 8/4/12.
21. Letter, Byron to Sheridan, 10/30/12.
22. Letter, Byron to Sheridan, 3/23/13.
23. Letter, Byron to Sheridan, 10/23/12.

Some of the exhibits above set forth and enumerated have been, by stipulation of counsel, and by virtue of an order of the Court, withdrawn since the trial. As to all of these exhibits so withdrawn, certified copies

(Testimony of Charles A. Stewart and David Hull.)

thereof accompany this bill of exceptions. As to all of those exhibits not withdrawn, the originals thereof accompany this bill of exceptions.

CHARLES A. STEWART

A witness called for the United States and sworn, testified as follows:

Direct Examination by Mr. Reames.

I am Chief Clerk in the office of the Comptroller of the Currency at Washington, D. C. I have here a certified copy of the charter of the First National Bank of Roseburg, Oregon.

The Government offered the copy of the charter in evidence and it was marked Government's Exhibit 1.

I have here the originals and certified copies of all the releases signed by former depositors of the First National Bank of Roseburg and filed in the office of the Comptroller of the Currency.

Whereupon the witness produced the said originals and the said certified copies of said releases and delivered them to the attorney for the defendant, for use during the trial, in any manner that the defendant might wish.

DAVID HULL

A witness called on behalf of the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Reames.

I have lived in Roseburg, Oregon, about 24 years. I work in a livery stable and have followed that occupa-

(Testimony of David Hull.)

tion 12 or 14 years. I have known Mr. Sheridan for 15 or 16 years and was one of the depositors of the First National Bank of Roseburg and had a deposit with that bank for 12 or 14 years. I had a conversation with Mr. Sheridan, relative to the loaning of some of my money, in March, 1906. I told Mr. Sheridan, one day I met him, I had some money. I said, "Mr. Sheridan, how about loaning out some money to a good man?" "Am I a good man?" I said, "Yes, sir, you are, Mr. Sheridan." I never gave him any other authorization except that.

Government Exhibit No. 2 was offered and received in evidence, this being a promissory note, of date March 2, 1906, for the sum of \$512.50, payable on demand, to the order of David Hull, with interest at six per cent, it being admitted by the defendant that the note was signed by the defendant.

Witness continuing: Mr. Sheridan paid me \$10 interest on that note, and no more.

By Mr. Reames:

The purpose of it is this: The Government will contend that he had authority—what authority he had was limited to this \$500 loan, and that he got that, but that he had no authority to loan any more—that made the limit of his authority. Now, it might be contended on the part of the defense that if that loan were paid, it might be argued that he had authority to loan it again, but the purpose of proving the note has not been paid is to show that the previous authority ended there.

(Testimony of David Hull.)

COURT: If that is the purpose of it I will admit it.

MR. FULTON: It might be for that purpose.

Witness continuing: That is the only conversation or authority I ever gave him. That is the only talk me and Mr. Sheridan ever had about loaning my money.

There was received and marked for identification:

Government's Exhibit 3, being a memorandum check, dated Dec. 23, 1909, against the account of David Hull, at the First National Bank, for \$800.

Witness continuing: I never signed that memorandum check. I received a note for that \$800, being the note of John Sheridan. I first learned of this \$800 transaction about a year and a half ago. I put it into Mr. Eddy's hands. Mr. Eddy is a lawyer at Roseburg and I put my business in his hands. That was the first time I ever knew of this \$800 transaction. Mr. Eddy then told me that it was Mr. John Sheridan who owed me \$800. Upon that loan there has been \$460 paid.

By Mr. Reames:

I hand you a memorandum check, dated March 4, 1911, which I have stated to the Court forms the basis of Count No. 1 of the indictment, purporting to have been signed by David Hull, reading to the order of B. C. Agee, amount \$230, and ask you to look at it and say you signed it. Did you ever sign that?

Answer. No, sir, I never did.

Question. Did you ever authorize Mr. Sheridan to loan your money to Mr. B. C. Agee?

(Testimony of David Hull.)

A. No, sir, I never did.

Q. When did you first learn that your money was loaned to Mr. B. C. Agee?

A. Well, I got a letter from the National Bank Examiner; got it out of the post office; took it to Mr. Hedgpeth; had him read it, and he said, "That is all right," so I had him sign my name. That was the first time I knew my money had been loaned to Mr. Agee. I cannot read or write.

Q. I have your promissory note, of date March 4, 1911, the same date as the memorandum check, in your favor, for \$230. Did you ever have possession of that note? Did Mr. Sheridan ever give you possession of that note?

A. No, sir, not that I know of.

The memorandum check, of date March 4, 1911, was marked Government's Exhibit 4, for identification.

By Mr. Reames:

That is the transaction on which we rely on Count 1 of the indictment.

Witness continuing: I never met National Bank Examiner Goodhart.

Q. I hand you here a letter written to you under date of June 20, 1911, the original of a letter addressed to Mr. David Hull at Roseburg, Oregon, purporting to be signed by Richard W. Goodheart, National Bank Examiner, with release at the bottom signed by David Hull, and ask you whether or not you wrote that. Did you write your signature there?

(Testimony of David Hull.)

A. No, sir, I did not.

Q. I wish you would tell the jury in your own way how you came to sign that or authorize that to be signed.

MR. FULTON: He says he didn't sign it.

Q. How did you come to authorize this to be signed?

COURT: He testified a while ago somebody else signed it at his request.

Q. Tell about that time with Mr. Hedgpeth.

A. I got that letter, that I am going to tell you, and I took it down to the stage barn and Mr. Hedgpeth was there and I had him read it and he said "That is all right, sign it," and I said, "if it is all right I will sign it," and I did, and I took it and put it in my pocket and I didn't give it to Mr. Sheridan until next morning and I met him at the bank, on the sidewalk outside, and he read it and went on in the bank and that is all there was to it.

Q. Now, this statement says that you had authorized him to loan \$230 to Mr. Agee; had you given him that authorization?

A. No, sir, I did not. Not at that time. I had Mr. Hedgpeth sign it.

Q. But was the authorization you gave him to loan the \$500 the only authorization you ever gave him?

A. Yes, sir, that is all I ever gave Mr. Sheridan to take——

MR. FULTON: Now, Mr. Reames, I don't want to interrupt by objection, but I object to your saying

(Testimony of David Hull.)

“was that the only authorization?” Now, you can ask him if he had any other conversation about it, because authorization is a conclusion to be drawn.

Q. Did you ever have any other talk with him, Mr. Hull?

A. No, sir, I never did.

Q. About telling him to loan your money?

A. I never did.

CROSS EXAMINATION.

By MR. FULTON.

Witness continuing: I had been in the bank and I said, “How about loaning about \$500 of my money to a good man?” and Mr. Sheridan said, “Ain’t I a good man?” And I said, “Yes, sir.” I have no idea when that was. I don’t know how much I did have in the bank at that time. I knew then that he took \$500. I didn’t know exactly at what time, for he didn’t say, but I expected him to. I don’t know what year this was in. I suppose he took \$500. I told him to take it. I never got no note. I suppose the note is in the bank. I had a bank book. (Produces bank book).

Q. By MR. FULTON: Well, I see here on March 22, 1906, is a debit charge to you; this shows that it was taken out of your account, \$512.50; do you think that was the amount?

A. I have an idea; I could not swear to it. I had a deposit in the bank. I know that.

(Testimony of David Hull.)

Q. Well, here is a note dated March 2, \$512.50. Did you get that note? (Government's Exhibit 2.)

A. I got that in the lawyer's hands, the note left in the bank; I didn't know the note was there; I know I put five hundred——

Q. You didn't put this \$512.50 in the lawyer's hands, did you?

A. I put all my notes in his hands; all the notes I had. He got them out of the bank. This was about a year ago, a little over, that I put them in his hands. I did this so that the lawyer would collect the money for me from Mr. Sheridan. I never did authorize the \$800 loan. Mr. John Sheridan paid \$460 on the note. I have this \$800 note in my lawyer's hands. The note is signed John Sheridan, by Tom Sheridan. Shows that it was signed the name John Sheridan by Tom Sheridan. There has been \$400 paid on the principal and \$160 on the interest. This was paid about four or five months ago.

Q. By MR. FULTON: And since Eddy has it, did John Sheridan pay some—has he paid this \$400 since Mr. Eddy has it?

A. Yes, sir.

Q. And he had paid the interest before?

A. Oh, yes, yes, paid the interest before.

Q. What was that \$160 besides you mentioned that was paid?

A. That paid the interest.

Q. That was on the interest?

A. Yes.

(Testimony of David Hull.)

Witness continuing: I never got my bank book straightened out. I put money in the bank, took the book along and the man entered—would put down what I drew out and what I put in. They fixed it up one time, I remember. They had Mr. Harry Stapleton, the bookkeeper, fix it up.

Q. Now, later on, when the bank examiner was there, you say that you received from the bank examiner a letter, which I now hand you, and ask you if it is the one to which you referred.

A. I don't know much about that, but——

Q. Do you—look at the signature there, David Hull, and see if you recognize that as the one which you say you had signed for you?

A. Yes, sir, that is the one Mr. Hedgpeth signed.

Q. You recognize that?

A. Yes, sir, the very one.

Q. Who was it signed that for you?

A. Mr. Hedgpeth, Al Hedgpeth.

Q. Mr. Hedgpeth wrote your name, by your direction, to that?

A. Yes, sir.

Q. You went with this after you received this from the post office, as I understand, you went down to the livery stable?

A. Yes, sir.

Q. Where Mr. Hedgpeth was?

A. Yes, sir.

Q. You showed it to him?

A. Yes, sir.

(Testimony of David Hull.)

Q. And he read it to you. Well, how long did you talk to Mr. Hedgpeth about it?

A. Oh, ten or fifteen minutes, I guess, maybe; I never timed myself to see the time it was.

Q. He read the whole letter to you, did he?

A. Yes, sir.

Q. I will read this and see if it sounds to you just the same as it was read to you. (Reading): This is "Roseburg, Oregon, June 20, 1911. Mr. David Hull, Roseburg, Oregon, Dear Sir: The records of this bank showed at a recent examination that certain charges had been made in your account by President Sheridan; in other words, part of your deposit had been withdrawn and loaned by him. Mr. Sheridan states that you authorized him to draw these funds and invest them for you. If this is so you will kindly sign the certificate at the bottom of this letter and return in the enclosed addressed envelope. Mr. Sheridan informs me he has withdrawn the following sums, which he loaned to parties mentioned below: \$230 loaned to B. C. Agee. Very respectfully, Goodheart." Some initial there I don't understand. "National Bank Examiner." You understand that? That had nothing to do with this \$512?

A. No, no, had nothing to do.

Q. This is the \$230 mentioned in the indictment. Now, right below there is this about, which I read, and this is the one which you had him sign. "I hereby certify that any sums withdrawn by Mr. T. R. Sheridan from my balance on deposit with the First National Bank of Roseburg, Oregon, were duly authorized by

(Testimony of David Hull.)

me, and the First National Bank is relieved from all liability relative to the same." Now, you understand that when I read it?

A. Yes, sir.

Q. You understand that it said any sums withdrawn by Mr. Sheridan from your account was by your authority? You understand that is what it says? You understood that when it was read to you by this gentleman to whom you showed it? Didn't you? You understood it there?

A. He told me that would be all right.

Q. I say you understood?

A. Certainly.

Q. What it said, just as you understand it now?

JUROR: Did he read the letter to you?

A. Yes, sir, he did.

JUROR: Read it over to you.

A. Yes, sir, he did.

JUROR: Read the whole thing over to you?

A. Yes.

Q. He read it just as I am reading it now?

A. Yes, sir.

Q. And you understood it then as you understand it now?

A. Of course.

Q. Is that correct?

A. That is right.

Q. That is right—and then you told him to sign it—sign your name to it?

(Testimony of David Hull.)

A. Yes, sir.

The defendant offered and there was received in evidence, marked Defendant's Exhibit No. 1, a photographic copy of the letter of the National Bank Examiner, with the release clause attached.

Q. By MR. FULTON: Now, I find in looking over this little bank book of yours that under date of December 23, 1907, it shows that there was withdrawn from your account and charged to your account, \$800; did you notice that at the time you got your account?

A. No.

Q. You did not?

MR. FULTON: Now, at this time, Your Honor, as respects that \$800 I move to withdraw from the jury all testimony that has been given concerning it, because it seems now that it has no relation to the matters charged in the indictment at all. At the time it was offered here I probably misunderstood Mr. Reames, but I did get the understanding that the one with the \$400 balance on the 4th day of April, is it, or March——

MR. REAMES: March.

MR. FULTON: —was the one which he said related to the indictment.

MR. REAMES: Now, the Agee one is the one which I said related to the indictment.

MR. FULTON: The one charged in the indictment, Mr. Reames, is this \$230?

MR. REAMES: \$230 to B. C. Agee.

(Testimony of David Hull.)

MR. FULTON: Yes, B. C. Agee, \$230. It seems now clear enough that the \$800 had nothing whatever to do with the charge in the indictment. I move to strike out the testimony relative to that.

MR. REAMES: It has this to do with it, if the Court please. The Government has proved that whatever the authority of the defendant was to loan any part or portion of the depositor's money was limited to the loaning of \$500 to a good man, and the defendant asked him if he was a good man and he said yes. Now, he completely took up that authority and exercised all his rights under it when he loaned \$512.50 to himself on the 2nd day of March, 1906, and gave his note for it, which note still remains unpaid. He had the authority to loan that money—assuming that he had the authority to loan that money, although it might well be contended that the rate of interest had not been agreed on, but he went ahead and acted on it. Now, the depositor gets the note for the first time several years later, when he gets it from an attorney who goes to the bank and gets it. Now, under that assumed authority the defendant Sheridan takes \$800 more, which he loans to his brother in exactly the same manner, and then without any authority at all, as we contend, loans \$230 to Agee. Now, in view of the fact that we have proven what the authority was, and all that it was, and the witness says that is all the authority he ever gave him, why, certainly we are entitled to say that that authority had been all taken up and that he had no more authority to loan any more of these other sums, and I will say to Your Honor that we will sup-

(Testimony of David Hull.)

plement that by the books, by showing the condition of the Agee account and the condition of the John Sheridan account at the time these other loans were made.

COURT: Of course this \$800 transaction is not competent to show authority or want of authority for these other transactions set forth in the indictment. It may be competent on the question of the fraudulent intent, but the question as to whether or not he had authority on one occasion can be no evidence as to whether he had or had not authority on another occasion.

MR. REAMES: That question will arise a good many times on the trial. I believe if I could make my position clear in the matter—my position is this: Assuming that on the 22nd day of March, 1906, the defendant was authorized to loan \$512.30 to himself. Now, then, the defense could contend that that authority would continue until it was revoked, and until such time as the authority was expressly revoked then Sheridan would have the authority to loan \$512.50 to any good man or to Sheridan himself. Now, on the day, or about the same time he uses up this authority. Then if he had the authority he had no further authority after that. Now, then, going a step farther, with the record, Your Honor, in that shape, he loans an additional \$800 to his brother. Now, I contend that we are entitled to introduce that, not only for the purpose of showing the intent, but also for the purpose of showing that the authority that the defendant had had all been used up and more than used up before the \$230 transaction. Now, again——

(Testimony of David Hull.)

COURT: Of course if the authority was limited to the first transaction the fact that he made another loan afterwards would neither tend to prove or disprove authority.

MR. REAMES: If you will just bear with me one minute farther on the same point. Now, the witness says that he understood what that statement meant when he signed it, and yet he also testified that he did not know anything about the \$800 loan, at the time that he signed it. Now, of course, the law is well settled, and I don't think it will be seriously disputed that a man cannot ratify something he doesn't know anything about. The depositor could not ratify the loan to John Sheridan, or the loan to Agee, if he didn't know anything about them.

COURT: He could not ratify it, anyhow, so far as these criminal charges are concerned.

MR. FULTON: The point I make, or care to make, is this, Your Honor. They charge here in this indictment that he abstracted this \$230 and converted to the use of himself and Agee. Now they offer evidence respecting this \$800. I don't think it is one of these cases, Your Honor, and I do not think these are circumstances that come within the purview of the rule which allows you to show other like acts for the purpose of charging the party with a guilty knowledge, we will say. It does not seem to me that it rests on the same principle, as, for instance, a false entry in a book, in a bank book, account; now, there is an act of the party.

(Testimony of David Hull.)

You show the act of the party himself, which must necessarily have been wrong, because it is a false entry, he enters a note that does not exist at all, and that would tend to show a course, a method, a system, all of which was fraudulent and would point to and indicate guilty knowledge and guilty purpose and guilty intention. But here is a matter that is a matter purely of dispute between the parties. It is conceded that he had authority for one appropriation and then it is charged in the indictment he didn't have authority for another particular one. All right. That I concede is a matter to be litigated, a matter to be determined on the testimony. And now they seek to bring in another matter that is not mentioned in the indictment, that depends entirely upon the controversy between the parties. It is bringing in an independent case which cannot, except as established by the—purely by the evidence of the parties cannot tend to show guilty knowledge or good faith—cannot tend to show anything of the kind; because it is a separate transaction between the parties and depends entirely upon the testimony of those parties. He says he didn't have authority, the other man will say that he did have authority. He admits that he ratified it at one time, admits that he did, so far as there could be a ratification, and after all, how can that be said to indicate guilty knowledge or corrupt intent or fraud, where it is a separate transaction growing out of separate relations, or rather, or separate arrangements—necessarily growing out of separate arrangements, if any at all, and rests necessarily in the conflict of testimony in dispute

(Testimony of David Hull.)

between the parties. It is not like the bankrupt or like the counterfeit case, for instance, which is about the best illustration we have of other incidents to show guilty knowledge. A man is found with a forged note, or he is found with counterfeit in his possession, or passing it. Now, the mere fact that he passed a counterfeit bill at one time might or might not be persuasive evidence of his guilt, but the fact that he is passing counterfeit every day, or that he has passed several counterfeit bills or counterfeit coins, would increasingly show—with increasing ratio would tend to show his guilt—guilty knowledge; but that is not true in a case of this kind, where it is purely a matter of separate transactions between the parties. Now, it all depends on what the agreement between the parties was, whether or not Mr. Sheridan had a right to take that money and use it for himself or loan it to others; all upon the agreement. Proving that he didn't have an agreement in one case I don't think tends to show that he had no agreement in the other. Now, he concedes he had an agreement with him as to the \$512, had an agreement with him in regard to that. Now, that don't necessarily authorize him, but the other may be implied; he could infer that he had and it is purely a question as to what the real authorization was and it is not proven that he used the money at all. It is not proved that he had the authority, it is not proved that he didn't have the authority, or the fact that he used the money. Whether he did depends upon what the parties said. Now, he says the authority only went to the \$500, we say the authority went to the whole, but

(Testimony of David Hull.)

that is a matter of dispute between the parties, of course. The fact that he used it for another transaction, got \$800, does not tend to prove one thing or another, because it all rests upon what the agreement between the parties was, and that does not tend to prove or disprove the agreement between the parties; at least I can't see that it does. If our statement is correct he had a right to it; if his statement was correct it was limited to a certain one, and it all goes back to what the real agreement was between the parties, and his using it for this other only tends to complicate the situation, and I think the testimony ought to be confined to the charge in the indictment, as to whether or not that was in excess of his authority. Showing that he had exceeded his authority in some other matter, even if he did, does not seem to me would tend to show fraud, but it all rests, after all, upon what the agreement was. He limits it to \$512, we say it included the whole. And I don't think that they show guilty knowledge or they show fraudulent intent by showing this \$800, which is not mentioned at all in the indictment, and which it seems to me ought not to be put in.

COURT: As I stated a while ago, I am satisfied it is not competent for the purpose of showing authority or the want of authority, but I am satisfied that this belongs to that class of cases where evidence of similar transactions is competent on the question of intent. Suppose a reputable banker should sign the name of a depositor to one small check, a jury would be reluctant to find there was fraudulent intent there, even though

(Testimony of David Hull.)

there was no authority, they would attribute it to mistake or something else, but the checks might be so numerous or the checks might be so large that the inference would be otherwise. Of course, the weight of the testimony would be for the jury, and I will say to the jury now that it is no question of the authority or want of authority, that these transactions must depend upon the count relating to them. The motion is denied.

MR. FULTON: I will save an exception to the overruling of the motion.

Q. I think you, Mr. Hull, have said—you produced this and I understood you to say this is your bank book?

A. Yes, sir.

Q. This is your bank book?

A. Yes, sir.

Q. With your bank?

A. With my bank.

Q. Covering the periods mentioned in here?

A. Yes.

MR. FULTON: We offer that, Your Honor, in evidence.

MR. REAMES: We have no objection.

COURT: Admitted.

Marked Defendant's Exhibit 2.

Q. Can you tell us how often you received that book from the bank—how many times?

A. No, sir, I cannot tell you; I had it in my possession all the time.

(Testimony of David Hull.)

Q. It was always in your possession, but you would go to the bank sometimes to have it written up?

A. I didn't have it written up but once, I guess, to my knowledge.

Q. When was that?

A. I don't remember when it was. I don't remember about when it was, having it fixed up.

Q. I see it was balanced, as we call it—you understand what it means, the balancing a book, don't you? This line is drawn across here and the footing is written and that amount there indicates the amount there is in that column; both the figures above and these over here indicate the amount, the sum of the figures here, the difference between those two sums is the amount you have in the bank, or, on the other hand, the balance you owe the bank, whatever it may be.

A. Yes.

Q. Now every time these are balanced, that was, the book is written up?

A. Yes.

Q. Now, you would hold the book in your possession all the time?

A. Oh, yes.

Q. And the bank could not get it unless you took it to that, so every time it was balanced you must have taken it to the bank?

A. I would not leave the book in the bank long; just long enough to have it written up. I left it there to be balanced. Everybody take the book in every once in a while and get the book balanced up. I wanted to

(Testimony of David Hull.)

see what the state of my account was in the bank. When the book would be balanced they sent it back to me with the checks in a bundle and I would get the book back with all of the checks that had been drawn against my account since the last time it was balanced, but I never did go over my checks to see what they were when I got them back. I did not have anybody go over the checks for me. My lawyer, Mr. Eddy, found the check for \$230 and the check for \$800 among the bundle of checks that had been sent back when the book had been balanced. This was a little more than a year ago.

Q. By JUROR: That gentleman that read that to you—you understand it—that read that thing to you—you went wholly on what he said; suppose he had said, “it is no good, don’t sign it,” would you have signed it?

A. No, certainly, I would not have signed it.

RE-DIRECT EXAMINATION.

By MR. REAMES:

When my book was handed back to me after it had been balanced, in January, 1911, I did not know that my account was in overdraft \$263. I do not know what an overdraft is. I never did draw out any more money than I had in the bank. I never to my knowledge drew out any more money than I had in the bank. I took my cancelled checks and my book statement, the bank statement, to my lawyer at Roseburg, Mr. Eddy, about a year ago. And prior to that time I did not know any-

(Testimony of C. W. Hedgpeth.)

thing about the memorandum check, by which the money was drawn out for Mr. Agee. At the time I had Mr. Hedgpeth sign the release I did not know that Mr. Sheridan had already taken out \$230 from my account. I thought it was authority for him to take it. Yes, that much.

Q. By MR. REAMES: Now, that statement that you signed said that you had previously authorized him to take that money; now, in truth and in fact, had you given him that authority to loan that money to Mr. Agee?

A. No, sir.

C. W. HEDGPETH

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live at Roseburg and have lived there approximately twenty years. I have known David Hull fifteen years. I am working for the Roseburg-Myrtle Point Stage Company. I signed the name of David Hull to the release (defendant's exhibit 1). The circumstances have been pretty well stated by Mr. Hull. The document was brought—I supposed from the bank, at the time he brought it, he asked me to read it for him and I did so, and he asked me if I thought it was all right and the meaning of it, and I gave him my interpretation of

(Testimony of C. W. Hedgpeth.)

the meaning of it, that it was a request from the bank to allow Mr. Agee to have \$230 of his money, then on deposit in the bank, and he said that was all right, to sign it, and I signed his name.

CROSS EXAMINATION BY MR. FULTON:

Q. You say you read that to him?

A. Yes, sir.

Q. This says, "I hereby certify that any sums withdrawn—withdrawn by Mr. T. R. Sheridan from my balance on deposit with the First National Bank of Roseburg, Oregon, were duly authorized by me, and the First National Bank is relieved from all liability relative to the same." Did you read that to him?

A. I don't know whether I did or not.

Q. Well, what did you sign? Didn't you read that where you signed your name?

A. It is my impression so.

Q. Just answer my question. I am not asking for your impression. I am asking you if you read that note there to which you signed his name?

A. I suppose I did, but I have no recollection of that part of it.

Q. Well, where did you get any recollection as to the authorization at all?

A. The request to let Mr. Agee have \$230 of Mr. Hull's money.

Q. Do you testify now that there was a request in there that he let Mr. Agee have \$230 of his money?

(Testimony of S. A. Sanford.)

A. That was my interpretation of it.

Witness continuing: I understand this release now when I read it. My recollection was that it was a request for leave to make a loan, but that is not my interpretation of it now. It is very simple and easy to understand, yes.

S. A. SANFORD,

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES:

I live near Roseburg and am a rancher. I am the trustee of the First National Bank of Roseburg. I went to Roseburg in 1901 and entered the employ of the bank at that time in the capacity of bookkeeper, serving as bookkeeper for five years and was then elected cashier. Since my first work for the bank I have worked for it continuously until it went into liquidation and then I continued to serve as its trustee. After the consolidation of the two banks I retained the books and records of the First National Bank, as its trustee.

By MR. FULTON: We will admit the records of the bank. We will admit that is the records of the meetings. What purpose do you offer it for?

MR. REAMES: The purpose of offering the book is to show who the officers of the bank were, when elected and how they served, the duties of the officers as

(Testimony of S. A. Sanford.)

defined by the by-laws of the bank and the manner in which the business of the bank was conducted, and to prove that nothing appears in the minute book authorizing the president of the bank to make any of these loans that the Government will offer proof of.

MR. FULTON: I don't at the present time see that it is material what the duties of any officer of the bank, excepting the president, were. It may be that it will become material but I would want to know on what points you claim that was material, otherwise I have no objection to it going in for the purposes you mention. So far as Mr. Sheridan is concerned, we admit he was president of the bank. If you want to show that, we don't dispute that during all of these transactions he was president of the bank.

Minute Book marked Government's Exhibit 5.

Witness continuing: Mr. Thomas R. Sheridan was president of the bank from 1891 up to the present time. In the years 1910 and 1911 the directors of the bank were Thomas R. Sheridan, J. C. Sheridan, myself, Warren Reed, Morris Weber; Thomas R. Sheridan is the defendant in this case and J. C. Sheridan was a brother. It was the duty of J. C. Sheridan to write up pass books, post the general ledger and take charge of them. My duties as cashier was to keep the books, reconcile statements, clerical duties and to look after the accounts and books. Warren Reed was a director; he was a merchant and lived at Gardiner, which was located about 60 miles from Roseburg on the Umpqua River. Morris Weber

(Testimony of S. A. Sanford.)

was a director; he was a farmer. Mr. Sheridan and myself ran the bank. We all had our duties to perform in there. I didn't have charge of the loans; I never assumed any authority in the loans. He made those himself. I might have made some small loans, but no large ones. T. R. Sheridan did have charge of making the loans for the bank. The book you show me is the individual ledger of the First National Bank of Roseburg, Oregon, for the year 1909, and shows the individual depositors of the bank and the check accounts. It shows the deposits that are made to the credit of the individual depositor and the checks drawn against his account. It is balanced every day. This is one of the books kept under my direction as cashier.

MR. REAMES: The Government offers the individual ledger in evidence. Do you want to require any further proof of it?

MR. FULTON: No.

COURT: What parts of it?

MR. REAMES: I would like to draw from all of it.

MR. FULTON: That is the ledger, you need not make any further proof than that, but of course we don't want the whole of that in evidence, because there is so much of it utterly immaterial, supposing the case went up.

MR. REAMES: I would not want that, of course, but I would like to have it in to this extent, that there

(Testimony of S. A. Sanford.)

are a great many depositors' accounts that will be material here to which I would like to direct his attention.

COURT: It will be considered in evidence for that purpose.

MR. FULTON: Reserving our right to object to any particular account.

COURT: Oh, yes.

Witness continuing: Government's Exhibit No. 4 for identification is a memorandum check signed by and in the handwriting of T. R. Sheridan.

MR. REAMES: The Government will offer the memorandum check in evidence and ask to have it received and marked as Government's Exhibit 4.

Marked Government's Exhibit 4.

MR. FULTON: We have no objection, we admit it.

COURT: You admit the signature to all the memoranda submitted?

MR. FULTON: Yes, all that have been handed in here and marked for identification, they are his signatures.

COURT: That will dispense with further proof of their execution then.

Q. I hand you herewith a promissory note of date March 4, 1911, for \$230, payable on demand, to David Hull, purporting to have been signed B. C. Agee by

(Testimony of S. A. Sanford.)

T. R. S. (Addressing Mr. Fulton) Is it admitted that that is in the handwriting of the defendant?

MR. FULTON: Mr. Sheridan; yes, sir.

MR. REAMES: All right, sir.

COURT: Admitted.

MR. REAMES: The Government asks to have it marked as Government's Exhibit 6.

Marked Government's Exhibit 6.

Q. I hand you another instrument and ask you to examine it and tell the jury what it is.

A. Deposit slip, deposited with the First National Bank to the account of B. C. Agee, Roseburg, Oregon. The date is 3/4/11.

Q. The date is March 4, 1911?

A. Itemized down here, "Hull, \$230."

Q. And this is in Sheridan's handwriting?

A. Yes, sir.

Q. That is T. R. Sheridan?

A. T. R. Sheridan.

MR. REAMES: The Government will offer the deposit slip in evidence and ask to have it received and marked as Government's Exhibit 7.

COURT: Admitted.

Marked Government's Exhibit 7.

Q. Now, turn to page 600 of that individual ledger and look at the account of David Hull under date of

(Testimony of S. A. Sanford.)

March 11, 1911, and tell the jury what entry appears there. March 7.

A. March 7, 1911?

Q. March 7, yes.

MR. FULTON: Do you want to show in these accounts that the \$230 went out of Mr. Hull's account and was carried into Mr. Agee's?

MR. REAMES: Yes.

MR. FULTON: We admit that.

MR. REAMES: I want to show something else about it.

MR. FULTON: I thought I could shorten it.

MR. REAMES: You can on every other one, but on this one there is something I could not show on admission.

Q. What is the date, March 7, 1911?

A. March 7, 1911.

Q. What is the entry?

A. There is a charge against his account for \$230.

Q. Does that mean \$230 was taken from Mr. Hull's account at that time?

A. Yes, sir.

Q. Now, look at page 5 of the individual ledger and tell the jury if you can tell what became of that money, now, look under the date of March, is this March 4?

A. March 4.

Q. March 4, 1911. What entry do you find there?

(Testimony of S. A. Sanford.)

A. Find B. C. Agee was credited with \$230. The item appearing there is the name of David Hull, \$230.

Q. Now, then, prior to the time of that credit of \$230 in the account of Mr. B. C. Agee, what was the condition of Mr. Agee's account?

MR. FULTON: What is the condition of Mr. Agee's account?

MR. REAMES: Yes, sir.

MR. FULTON: What the materiality of that is I cannot see. Your Honor, I object to it at the present time.

MR. REAMES: I think it is material, if the Court please not only on this, but on a number of other items that will come in. I cannot very well tell the Court what the reason is without telling it to the jury, but if you would like to have me explain it, I could, but——

MR. FULTON: I don't know, of course, to what you want to testify.

MR. REAMES: I don't want to testify, but by telling you and telling the Court what I want it for, I would have to tell the jury what it is, that is the only thing.

MR. FULTON: Well, you know what is proper, so go ahead and make the statement to the jury.

COURT: Answer the question.

MR. REAMES: The purpose of this, as in a number of other items, will be to show that on that date

(Testimony of S. A. Sanford.)

of the credit the account of Mr. B. C. Agee was in overdraft.

MR. FULTON: I supposed so; I supposed that is what the idea was.

MR. REAMES: And the Government will supplement that with proof that Mr. Agee and Mr. Sheridan were partners, and the Government will therefore contend that he is at least outside the limit of his authority when he made any such a loan as that. In other words, it is a circumstance to take into consideration.

COURT: You are contending here that the defendant was loaning the money of the bank, or that he was drawing it out without authority?

MR. REAMES: I am contending that he was abstracting it without any authority at all.

COURT: What difference does it make what he did with the money?

MR. REAMES: Just as Your Honor indicated a few moments ago, that if a banker would take a small amount of money of his depositor on a deposit slip and take the money, that a jury will be very loath to say that he did it with any wrongful intent or any intent to defraud, but as Your Honor indicated, that if that was shown to be a general thing, a large number of transactions, that it might be introduced for the purpose of showing the intent and that it could not possibly be a mistake. Now then, when we have a condition where the account of a depositor is actually in overdraft I

(Testimony of S. A. Sanford.)

think it is material for us to show the purpose of that and the reason that he took the money was to take the account of his partner out of overdraft into a deposit, and we will supplement that by showing that Mr. Sheridan had an interest in that transaction, because the indictment says that he did it not only for the use and benefit of Mr. Agee, but he also did it for the use and benefit of himself.

MR. FULTON: Show that he had the interest, I will make no objection to that. I have some—a portion of that is true, I am not quite sure, that he was in some things associated with Mr. Agee, but whether their account was in overdraft or not does not in any manner that I can conceive of tend to throw any light upon whether or not he had the authority to take the money. I assume that people don't borrow money unless they need it and generally when a man has money on deposit and to his own credit he doesn't borrow, and likely that his account is in arrears when he borrows, as a rule, but when that is admitted as tending to show that, it dignifies it with being testimony of that character as tending to show that sort of thing, which it doesn't.

COURT: I know a bank examiner caught two of the wealthiest men in Yakima with overdrafts of \$750,000 in banks of Yakima, which doesn't prove very much.

MR. REAMES: That is true, in a condition, as Your Honor says, it seems to me it doesn't show anything.

(Testimony of S. A. Sanford.)

COURT: Of course you would have to go and show his solvency and insolvency. Of course, if there was an overdraft it would not prove anything except his financial condition.

MR. FULTON: I want to make this clear if I can, as my position: He is not to be held liable for any unwise investment of the money or use of the money. If he had a right to take the money, because he didn't wisely invest it or wisely loan it, is immaterial, the question is, did he have authority directly or implied, to take that and use it, either for himself, or loan it?

COURT: If that were the only issue in the case I would sustain your objection without hesitation, but such a wide field is thrown open on the other question and it is so hard to limit testimony to its proper sphere. I will permit him to answer the question, but, as I say, it doesn't prove anything, one way or the other.

MR. FULTON: I save an exception.

COURT: You may state what the condition of his account was.

Q. What was the condition of his account on that day, immediately prior to the credit?

A. The account was overdraft \$229.67.

Q. Now, turn to the individual ledger at page 600; is that the account of David Hull?

A. Yes, sir.

Q. Now, I hand you herewith a memorandum check, Government's Exhibit No. 3, for identification,

(Testimony of S. A. Sanford.)

~~E~~ and will ask you to examine the same and say in whose handwriting that is?

A. The handwriting of Mr. Sheridan.

MR. FULTON: That is that one regarding the \$800 transaction?

MR. REAMES: That is the J. T. Sheridan transaction.

MR. FULTON: On the ground we base our objection, we object to that and wish to save an exception.

COURT: Yes.

MR. REAMES: The Government will offer in evidence the Government's Exhibit No. 3 for identification and will ask to have it marked as Government's Exhibit 3. This is the memorandum check.

COURT: If agreeable to counsel I am willing that exceptions should be reserved to all rulings.

MR. FULTON: Where objections may be——

COURT: Yes, sir.

MR. FULTON: That is satisfactory.

Memorandum check marked Government's Exhibit 3.

Q. Now, look under date of Dec. 23, 1909, and read the item that appears there.

A. December 23?

Q. 1909.

A. 1909. David Hull's account was charged there with \$800.

(Testimony of S. A. Sanford.)

Q. With \$800. Now, what did that charge of \$800 do to David Hull's account?

A. Overdrew his account I notice.

Q. It did what?

A. Overdrew his account.

MR. REAMES: I asked him what that charge of \$800 of Dec. 23, 1909, did to David Hull's account.

MR. FULTON: We wish the same objection to all of that.

Q. What did it do to that?

A. Overdrew it.

Q. Put it in overdraft?

A. Yes sir.

Q. How much did it put David Hull's account in overdraft?

A. \$263.50.

Q. How, are you able to trace where that \$800 went from the book there?

COURT: Is there any dispute but what it went into this \$800 note referred to here, Senator?

MR. FULTON: I think not. Is there an \$800 note? There is an \$800 note?

COURT: You referred to it.

MR. FULTON: Oh, yes. It is my understanding that there is no dispute about it, Your Honor.

(Testimony of Mrs. Laura M. Verrell.)

MRS. LAURA M. VERRELL,

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live at Edenbower in Douglas County, Oregon, situated two miles west of Roseburg. I have lived there continuously for 12 years. Am 67 years old and have just recovered from a spell of sickness. I know Mr. T. R. Sheridan and have known him personally eight or ten years. I have been a depositor in the First National Bank of Roseburg.

A letter signed by the defendant, written to the witness, under date of April 6, 1911, was introduced and read in evidence. Government Exhibit Number 8.

Witness continuing: The mortgage mentioned in the letter was the Crouch mortgage, due me from Mr. Crouch, for \$4,000. When that money was loaned to Mr. Crouch, my son, Charles C. Verrell, attended to the business.

A memorandum check, of date April 15, 1911, upon the First National Bank of Roseburg, against the account of Laura M. Verrell, and in the sum of \$5,000, admitted by the defense to have been signed by the defendant and in his handwriting, and stated by Mr. Reames to form the basis of Count No. 4 of the indictment, was offered and received in evidence and marked Government's Exhibit No. 9.

(Testimony of Mrs. Laura M. Verrell.)

Witness continuing: Mr. Sheridan handed me this memorandum check. I did not sign it.

A promissory note, of date April 15, 1911, for the sum of \$5,000, due one year after date, in favor of the witness, admitted by the defendant to be in the handwriting of the defendant, was received in evidence and marked Government's Exhibit No. 10.

Witness continuing: This note I never had in my possession and I never saw it until I saw it before the Grand Jury at Roseburg, Oregon, a year ago last November.

Q. BY MR. REAMES: Now, Mrs. Verrell, I wish you would just go ahead and in your own way tell the jury all the transaction that you had with Mr. Sheridan relative to the loaning of your money for you.

A. He asked me if I wanted to loan that money that was paid in on the mortgage; he said he would get a good loan for me and I supposed it was to be the bank would loan the money. There was nothing said about it, that the bank was to loan that money, but he asked, not individually, but as President of the bank, a representative of the bank; I supposed that the bank was the one that was loaning—

COURT: Just state what was said.

A. Mr. Sheridan wanted to know if I wanted to loan it, and I said I didn't know, I was intending to put it into real estate, and he said I would better loan it, it would bring me more, and I didn't want to give him any answer at that time, I wanted to think it over,

(Testimony of Mrs. Laura M. Verrell.)

which I did, and he wanted to know at that time if I wanted to put any more with that \$4,000 and I told him I didn't know, that I would think it over, which I did, and I told him that I would put some more that time, but there was nothing said of how much to put with it, how much I would put with it, because at that time I expected to see him again before this loan was made.

Q. Did you ever authorize him to sign that memorandum—

MR. FULTON: Don't ask her that—

COURT: Objection sustained, she may state the conversation.

Q. Go ahead; have you told all the conversation?

A. That is all the conversation we had until he handed me the memorandum check; there was nothing said as to when the money was to be drawn from the bank or how.

Q. Go right ahead, Mrs. Verrell, and tell all your transaction.

A. When he handed me the memorandum check, I never saw a memorandum check before and I supposed that was to show the bank had loaned my money. I didn't know the difference, I never did any business along that line before, and I depended on him and had confidence in him that he would do what ought to be done—

MR. FULTON: Mrs. Verrell, please, we don't want to interrupt you, Mrs. Verrell, but you should

(Testimony of Mrs. Laura M. Verrell.)

confine your testimony to just stating what was said, not to what you don't know or what you think, just what was said.

A. He said my money was safe—safely invested, and I told him at that time that I didn't know as I ought to spare that much, and he said I could have it at any time by giving a short notice, so I let it go at that, and I supposed that my money was loaned by the bank.

MR. FULTON: Now, Mrs. Verrell—

A. I supposed my money was loaned by the bank and he was a representative of the bank—

MR. FULTON: I have to object to that.

COURT: The objection will be sustained; what she supposed is not evidence.

Q. Mrs. Verrell, did you at any time authorize him to take this money personally?

MR. FULTON: I object to that, that is the same question the Court has ruled on; state what was said.

COURT: Whether he was authorized is a mixed question of law and fact; it is a conclusion.

Q. I will ask this, did you ever tell him to take that money and loan it to himself?

MR. FULTON: That is leading.

A. No, I never did.

MR. FULTON: Let it go.

MR. REAMES: If the Court please, that question will arise—

COURT: The question has been answered.

(Testimony of Mrs. Laura M. Verrell.)

MR. REAMES: I want to be heard on that, if the Court please, and I don't want to unnecessarily take up the time of the Court. Now, as I understand, it is going to be incumbent upon me to establish that this money was taken in the manner and approximately the time named in the indictment, and that it was taken without authority of these people. Now, if it is, and if it is incumbent upon me to show that, then I contend that I should be permitted to ask each of these witnesses whether or not they authorized him or whether or not they told him that he could take this money for himself, and I think, if the Court please, that it is material for me to show that.

COURT: These witnesses can detail the conversations they had with Mr. Sheridan and it is for this jury to say whether he was authorized or not.

MR. REAMES: Yes, but the jury could not say, if the Court please, whether or not she ever told him to take the money and use it himself unless she testifies.

COURT: I say she can tell what she told him, but she cannot draw a conclusion as to whether or not that authorized him to do one thing or do another; that is for the jury. She can tell all that transpired between her and Mr. Sheridan.

Q. Did you ever at any time before the date of that memorandum check of date April 15, 1911, have any further talk with him about loaning your money to anybody, other than what you have detailed?

A. No.

(Testimony of Mrs. Laura M. Verrell.)

Q. Now, when did you first see that memorandum check, Mrs. Verrell?

A. Why, he handed it back to me in the bank.

Q. Do you remember about what time; this is the memorandum check, Government Exhibit 9, which is dated April 15, 1911?

A. Yes.

Witness continuing: I can't remember the date when he gave me that memorandum check; I remember I was in the bank and he handed me that check, and that is all that I can remember about it. No part or portion of the amount has ever been repaid to me. When the Crouch loan for \$4,000 had been made, prior to this transaction, I had signed the check myself and did not have to have any one to help me. I can read and write.

Q. Now, here is a letter dated June 20, 1911, written to you by a National Bank Examiner, Goodheart, purporting to be signed by you. I would like to have you look that over, Mrs. Verrell, and tell the jury whether or not you signed it, and if you did, the circumstances under which it was signed?

A. Yes, I signed that.

Q. Just go ahead now, in your own way, and tell the jury how you came to receive it and how you came to sign it.

A. Mr. Sheridan told me that I would receive that letter and when I received it to sign it and send it back to the bank examiner, which I did, but not before he saw the letter. He saw the letter, I took it to him after I had signed it, I signed that letter in my home and I

(Testimony of Mrs. Laura M. Verrell.)

took it to him and he looked at it and read it over and looked at it and he said it was all right and he put it in the envelope and sealed it himself, but that letter was misrepresented to me.

MR. FULTON: What?

A. That letter was misrepresented to me; there was no explanation made of it.

MR. FULTON: Mrs. Verrell, please don't make those statements; if you think there was anything said to you that was a misrepresentation, tell what was said; let us have what was said; just confine yourself to what was said.

A. That is all that was said.

Q. MR. FULTON: That is all that was said?

A. Excepting there had been some changes made in the bank and I was to sign the letter; that is all the conversation there was in regard to it.

Q. Now, Mrs. Verrell, can you tell us about when it was that Mr. Sheridan told you you would receive a letter from the Bank Examiner?

A. I cannot tell you just the exact date, but it was only a short time before I received it.

Q. What, if anything, did Mr. Sheridan tell you to do with the letter, in the event you received it?

A. He told me to sign it and send it to the Bank Examiner.

Q. Where were you when you received it?

A. At my home.

(Testimony of Mrs. Laura M. Verrell.)

Q. Was there any one there for you to counsel and advise with?

A. No.

Q. Did you counsel or advise with any one else except Mr. Sheridan?

A. I did not.

MR. FULTON: Immaterial, Your Honor, entirely immaterial; I object to it.

COURT: The question has been answered. I don't see the materiality of it.

Q. Well, where were you when you signed it, at your home or at the bank?

A. At my home.

Q. Now, tell the jury in your own way the circumstances under which you took it to the bank and to whom you delivered it.

A. I took it to the bank and showed it to Mr. Sheridan; he was at his desk, writing; I showed it to him and told him I had received the letter which he told me I would receive from the Examiner, and would like for him to look it over and see if it was all right before I sent it, which he did.

Q. Do you know whether or not the Examiner was at the bank at that time?

A. How?

Q. Do you know whether or not the Examiner was at the bank at that time?

A. No, I don't think he was.

Q. You didn't see him?

(Testimony of Mrs. Laura M. Verrell.)

A. No.

MR. REAMES: I think that is all.

CROSS EXAMINATION.

Questions by Mr. Fulton:

You left the letter with Mr. Sheridan?

A. No, I didn't leave it with him, he looked it over and put it in the envelope himself and sealed it.

Q. And you took it and mailed it?

A. I mailed it.

Q. You mailed it?

A. Yes.

Q. Now, you received this letter through the post office?

A. I did.

Q. And it was delivered to you at your home?

A. Yes.

Q. Now, you read it over, of course, when you received it?

A. Yes, I suppose I did; yes, I read it.

Q. Read it over all by yourself?

A. Yes.

Q. Do you remember about what time of the day you received it?

A. I do not.

Q. But you do recall that you were by yourself?

A. Yes.

Q. And you sat down and read it over?

A. Yes.

(Testimony of Mrs. Laura M. Verrell.)

Q. Now, I suppose you read it pretty carefully, didn't you?

A. No, I didn't, not very.

Q. There was nobody there to disturb you?

A. No.

Q. Did you read it more than once?

A. No, I don't think so; I don't remember that I did.

Q. What say?

A. No, I don't remember that I read it but once.

Q. Well, you read it over to yourself so that you had no difficulty in understanding it?

A. Well, no, I can't tell you that I understood it.

Q. What?

A. I can't tell you that I understood that letter.

Q. Can't say that you understood it, Mrs. Verrell?

A. No.

Q. Well, there is nothing very difficult about it to understand. Let me read it to you, Mrs. Verrell, and see if you cannot understand. "Dear Madam:" After addressing you:

A. Yes.

Q. "The records of this bank showed at a recent examination that certain charges had been made in your account by President Sheridan." You can understand that some charges had been made in your account. "In other words, part of your deposit had been withdrawn and loaned by him. Mr. Sheridan states that you authorized him to withdraw these funds and invest them for you. (If this is so, kindly sign the certificate at

(Testimony of Mrs. Laura M. Verrell.)

the bottom of this letter and return in the enclosed addressed envelope." Now notice: "Mr. Sheridan informs me that he has withdrawn the following sums, which he has loaned to the parties mentioned below: \$5,000 loaned to T. R. Sheridan." Now, that is not difficult to understand, is it, Mrs. Verrell?

A. No.

Q. That says \$5,000 loaned to himself, T. R. Sheridan; you understood that, didn't you, when you read it?

A. I read it.

Q. You understood it, didn't you?

A. No, I don't know that I understood it.

Q. Oh, Mrs. Verrell, you could understand that?

A. Why should I understand that when I never loaned it to him? I never loaned him any money.

Q. I mean you could understand it when you read it, that Mr. Sheridan had reported to the Bank Examiner that \$5,000 of this money had been loaned to Mr. Sheridan by your authority. You understood that? Then we will read a little farther. That is signed by the Bank Examiner. And down below is this statement, which you signed: "I hereby certify that any sum withdrawn by Mr. T. R. Sheridan from my balance on deposit with the First National Bank of Roseburg, Oregon, were duly authorized by me." Now, you understand that, don't you?

A. Yes, sir.

Q. Now, when I read it, you understand it, don't you?

A. Yes, I understand it.

(Testimony of Mrs. Laura M. Verrell.)

Q. That is not difficult to understand at all, is it? Now, when you read it all by yourself you could understand it, couldn't you? Couldn't you?

A. I could not tell you; I can't answer that question.

Q. What?

A. I can't answer that question.

Q. You can tell us whether or not you understood it, surely?

A. I don't think I did understand it fully.

Q. You can understand what it meant by being authorized by you, that any moneys drawn from your account were authorized by you. You understand that, and up above there it was said that \$5,000 had been withdrawn. (Addressing Mr. Reames): Was this introduced in evidence?

MR. REAMES: No, I just questioned her about it?

MR. FULTON: I will offer it in evidence.

COURT: The copy will be admitted.

MR. FULTON: Yes, the same as the other.

Marked DEFENDANT'S EXHIBIT NO. 3.

Q. Now, Mrs. Verrell, you knew all the time that Mr. Sheridan had this money of yours, did you not?

A. I didn't know that he had it.

Q. Well, when this memorandum check was given to you, you understood that he had it, didn't you?

A. He never told me that he had the money.

(Testimony of Mrs. Laura M. Verrell.)

Q. When do you want us to understand that you first understood that he had your money?

A. I think—I cannot tell you just when I knew that; I didn't know for certain, I don't think, until I was called before the Grand Jury.

Q. When was that?

A. A year ago last November.

Q. A year ago last November. Now, I ask you to look at the letter which I hand you and tell me who wrote that letter?

A. I wrote it.

Q. Did you write that letter to Mr. Sheridan?

A. I did.

Q. And did you write it on the date—you will observe it bears date September 9, 1912.

A. Yes.

Q. Now, that was a long time before the grand jury met, wasn't it?

A. Yes.

Q. This letter reads as follows—

MR. REAMES: We have no objection.

MR. FULTON: We haven't offered it yet.

Q. This letter reads as follows: "Mr. T. R. Sheridan, 215 Cherry Street, San Francisco, California, Dear Sir: Will you please send me one year's interest on money loaned? Can you tell me when you will be in Roseburg? I wish to interview you personally in regard to business matters. Very respectfully, Laura M. Verrell." Now, there you were, writing to him; he was in San Francisco at that time?

(Testimony of Mrs. Laura M. Verrell.)

A. Yes.

Q. And you were writing to him to send you one year's interest on your money loaned; what money was that?

A. The money that I supposed the bank had loaned for me, that \$5,000 was a bank loan.

Q. Why were you writing to Mr. Sheridan in San Francisco?

A. He was the one doing the business and I supposed he was still doing the business. I didn't know.

Q. Why didn't you go to the bank?

A. Because I didn't suppose it was necessary to go to the bank; he was the one that had done all the business; he represented the bank.

Q. This was written in Edenbower; where is Edenbower?

A. Where I live, two miles from Roseburg.

Q. Practically a suburb of Roseburg?

A. Yes.

Q. And instead of going to the bank or any of the bank officials you wrote to Mr. Sheridan to send you the interest on your loan?

A. Well, he had loaned—he was the same as the bank; when I speak of Mr. Sheridan I speak of the bank; he was President of the bank.

Q. But you didn't think the bank was in San Francisco?

A. No, but he used to be back and forth all this while, and he was attending to this business for me.

(Testimony of Mrs. Laura M. Verrell.)

I didn't know it was necessary to go to any of the rest of the bank.

Q. If you had thought that the bank had loaned it, you wouldn't have gone to the bank?

A. No.

Q. Why didn't you say the money the bank had loaned? You say, "Will you please send me one year's interest on money loaned." That implies money loaned to him, doesn't it?

A. No, I don't think so? He wouldn't take it that way, or he ought not to.

MR. FULTON: We offer that letter in evidence.

COURT: Admitted.

Marked DEFENDANT'S EXHIBIT NO. 4.

Q. Now, Mrs. Verrell, when you went into the bank after you had signed this letter at your house, at your own home, you went and showed it to Mr. Sheridan first, did you?

A. Yes.

Q. You went into his bank and showed it to him?

A. Yes.

Q. Please speak a little louder?

A. I did.

Q. And you asked him if it was all right, is that it?

A. Yes.

Q. Just state what you did?

A. Yes, I asked him if it was right; I asked him if it was right because I wanted to know if it was right before I sent it.

(Testimony of W. A. Sanford.)

Q. You had read it over previously?

A. Yes.

Q. And signed it?

A. Yes.

Q. And he simply said what?

A. He said it was all right.

Q. That is all he said?

A. That is all he said that I remember of.

Q. Well, he didn't say to sign it?

A. He told me to sign it; he told me before I got the letter.

Q. I am asking you what he said at the bank?

COURT: It had already been signed, according to her testimony.

Q. That is the point, so he didn't say to sign it there; he simply said there, "It is all right"?

A. Yes, that is what he did.

W. A. SANFORD

Recalled for the Government, testified as follows:

This is the individual depositors' book. I find an item on page 386 thereof, under date of April 15, 1911, in the account of Laura M. Verrell "loaned by T. R. S." The item shows that \$5,000 was debited her account on that day.

The defendant admitted that this \$5,000 was transferred to the account of Mr. Sheridan on the books.

(Testimony of W. J. Carlon.)

W. J. CARLON

A witness called on behalf of the Government, testified as follows:

Direct examination by MR. REAMES:

I live at Roseburg and have lived there since about 1873. I have known Thomas R. Sheridan fifty years and am 75 years old. I was a depositor of the First National Bank of Roseburg. In February, 1906, I had \$1750 on deposit there. About July 1st, 1911, I had a conversation with Mr. Sheridan, near the front of the Wells-Fargo office on Jackson Street, in Roseburg.

There was offered and admitted in evidence a memorandum check, admitted to be in the handwriting of the defendant, T. R. Sheridan, being of date April 7, 1911, upon the First National Bank of Roseburg, Oregon, against the account of W. J. Carlon, in the sum of \$1,000, and the same was marked as Government's Exhibit 11.

Witness continuing: I never signed it and never gave nobody else authority to sign it. Never authorized a man to sign a check for me in my life. Mr. Sheridan came to me on the street and says to me: "Bill don't you want me to loan that money for you?" He did not say he wanted to borrow it; he said: "Bill, don't you want me to loan that money for you?" I told him I didn't know; it would depend somewhat on what the security might be. He said that he would indorse the

(Testimony of W. J. Carlon.)

notes. Well, I told him I didn't know what his liabilities might be. He said: "You would not refuse to accept my endorsement, with all my volume of property, three dollars' worth for every dollar I owe?" I told him I might loan a part of it if the security suited me and before we separated, why, he spoke to me as if I would sign a release. I told him I didn't wish to sign no release in reference to the bank. He said nothing about these notes or this check or nothing at all. So after I had seen him—this man Goodheart—I never saw him at all, and would not know the man if I would meet him. I got a letter from Goodheart out of the post office and I didn't meet Sheridan again until July 8th in the Douglas County National Bank. July 8 I met him in the Douglas County National Bank and he presented these notes and he said: "Bill, I made notes for that money," and showed them up. I saw he had the date on them and I said "What?" and he said: "That is the date I got the money," and he said, "Don't say to them when you gave me permission." Well, I didn't say to them, because I never gave him permission to take a dollar of mine in my life. He had reference to the people in the bank, I suppose he had reference to that. This conversation was in the Douglas County National Bank in Roseburg and it was after the two banks had consolidated, and of course I supposed my money was transferred from there and knew nothing to the contrary until he presented this, because he had never said he had taken the money. Seven or eight or nine days after we had this conversation in front of the Wells

(Testimony of W. J. Carlon.)

Fargo & Company's Bank, it was; at the time I had the conversation with him at the bank I had already received the letter from the Bank Examiner. I got that out of the post office maybe that day and maybe the next after I had the first conversation with him. This note, of date April 7, 1911, for \$1,000, due six months after date, he gave me at that time, and gave me the memorandum checks in the same conversation.

There was offered and received in evidence promissory note of date April 7, 1911, for \$1,000, due six months after date, payable to W. J. Carlon, the defendant admitting that the note is in the handwriting of the defendant. The note was marked Government's Exhibit No. 12.

Witness continuing: I never signed the memorandum check of date April 27, 1911, for \$500. I never gave nobody else authority to sign it. Never had a man to sign a check for me, with my authority, in my life.

(There was offered and received in evidence memorandum check upon the account of W. J. Carlon at the First National Bank for \$500, of date April 27, 1911, the defendant admitting that the same is in the handwriting of the defendant. The memorandum check was marked Government's Exhibit No. 13. There was offered and received in evidence promissory note of date April 27, 1911, for \$500, due six months after date, signed T. R. Sheridan, the defendant admitting that the note is in the handwriting of the defendant. Note was marked Government's Exhibit No. 14.)

(Testimony of W. J. Carlon.)

Witness continuing: I received from Mr. Sheridan at that time at the bank the two memorandum checks and the two notes.

Witness continuing:

Q. Now, I hand you herewith what purports to be the original of a letter written to you under date of June 20, 1911, purporting to have been signed by Mr. Goodheart, National Bank Examiner, and will ask you to look at it and say whether or not you signed the release that is attached to that instrument, and if you did, tell the jury under what circumstances you signed it.

A. Yes, I signed that to that. I got this letter out of the post office and signed it after the time I received those notes.

Q. How much of that sum of \$1500 represented by those two memorandum checks and notes have been repaid to you—Mr. Carlon—how much of that money has been repaid to you?

A. I have got \$160. I wrote Mr. Sheridan the fall of 1912 to North Bend and he refused to answer me——

COURT: You have already answered the question.

A. —he received the letter for he showed it up in Roseburg since.

Q. Well, let's not go into that. Now, I want to call your attention to a conversation that you had with Mr. Sheridan at the Douglas National Bank at the time he handed you those notes and memorandum

(Testimony of W. J. Carlon.)

checks; did he ask you at that time if you had signed the release?

A. Yes, he spoke to me in regard to it and I told him I didn't get to sign it. He said it was all right; it was one of their forms to satisfy this man Goodheart, and I consented to that, I would sign the release, and he said: "Don't say to him when you gave me permission to have the money." Well, I didn't say to them because I never have given him permission to take a dollar of it in my life.

CROSS EXAMINATION BY MR. FULTON.

Witness continuing: I don't know the date we had this first conversation but it was a few days previous to the 8th day of July, a few days would be six or eight or nine days, such a matter. It was about the 1st of July; it might have been the 28th, or 29th or 30th of June, but I think it was right around the 1st of July. Mr. Sheridan spoke to me if I didn't want him to loan that money for me; I told him I didn't know, depended somewhat on the security; he said he would indorse the notes; he mentioned to me before we parted, I said something in regard to the amount of interest, I told him I didn't care if it wasn't over 5 per cent if the security was good, provided we made arrangements for to make the loan; it was understood that he was going to loan this money to somebody else and that he was going to be security for it. We hadn't agreed on any loan at all—when we separated we hadn't agreed on

(Testimony of W. J. Carlon.)

the loan. I think probably, of course, if he loaned the money to somebody else he would endorse it as security, maybe it might possibly be good. Of course, until we found out who the other person was, until the notes was made—he hadn't made them—that is, he had made them I guess, but I didn't know nothing of it. He had taken that money, I suppose, of course, and held it for something like close on three months and had endorsed these checks for me, which is forgeries—and put them in—had them there undoubtedly, because they are there today.

Q. BY MR. FULTON: That is all argument and you know that, don't you, Mr. Carlon? You know that is all argument. Wait a minute; you have been instructed several times to answer questions, not to give your opinions. Now, you know the difference between answering a question and abusing a man, don't you?

A. Yes, I certainly do.

Witness continuing: It was sometime in July or the first of July, or the last of June, that I had the first talk with Mr. Sheridan about loaning my money. He came to me. I was standing not far from the front of the Wells Fargo & Co. office in Roseburg, on Jackson Street. I never went to his office in the bank to ask him to loan my money or take it and use it himself. I know Mr. Gardner; I did not in the spring of 1911, in the back room of the old First National Bank at Roseburg, in the presence of Mr. Gardner, say to Mr. Sheridan that I wanted him to take my money and use

(Testimony of W. J. Carlon.)

it in some way or in any way to get interest and Mr. Sheridan did not reply, "Bill, I might lose it," and I did not answer, "Oh, no, you will not lose it," or words to that effect. I never had any such conversation as that with Mr. Sheridan. At the first meeting I had with Mr. Sheridan, the first conversation he asked me to sign the release. He asked me at the close of that conversation, that he wanted me to loan the money. He asked me if I didn't want him to loan it for me. It was in this same conversation that he asked me if I would not sign a release. I understood it was a release for the bank. It was after this I got the release through the post office. Sometimes I would not go to the office for a week, or such a matter, maybe longer, and I got that out of the office the first time I went to the post office after that conversation.

Q. How often did you go to the post office?

A. Sometimes I would go every other day and sometimes I would be for a week that I would not be about the post office.

Q. This bears date on the 20th day of June, 1911.

A. It may have been in the post office four or five or six days, I don't know.

Q. Anyway you got this out of the bank?

A. I got it out of the post office—I got the letter out of the post office.

Q. And what did you do with it when you got the letter out?

A. I opened it and put it in my pocket.

Q. Read it?

(Testimony of W. J. Carlon.)

A. Yes.

Q. Did you go home with it? Take it home with you?

A. I had it with me, yes.

Q. And then it was eight or nine days, probably, after that before you saw——

A. Before I met him again in the Douglas County Bank.

Q. In the meantime had you signed it?

A. I hadn't signed it.

Q. You hadn't signed it yet?

A. No.

Q. You had not signed it yet when you met him?

A. No.

Q. Then you carried this around with you for a week or ten days?

A. I carried it in my pocket; I wasn't in any hurry about signing it, didn't know whether I would sign it at all or not.

Q. Did you read it several times?

A. I read it.

Q. Probably read it over several times as you were carrying it around with you?

A. Not very often, I guess, but then I read it.

Q. Well, you did read it several times, didn't you? Did you understand it?

A. I may have read it a second time, maybe.

Q. Well, getting down to two times now, are you? Did you understand it when you read it?

A. I had some idea about what it was, of course.

(Testimony of W. J. Carlon.)

Q. What did you think this meant. "I hereby certify that any sums withdrawn by Mr. T. R. Sheridan from my account on deposit with the First National Bank of Roseburg, Oregon, were duly authorized by me, and the First National Bank is released from all liability relative to the same." What did you understand by that?

A. Well——

Q. Now, answer what you understood that to mean.

A. I understood it to be a release to the bank.

Q. Releasing the bank, and you understood it to say that he had been duly authorized to take the money, didn't you?

A. Now, he hadn't been duly authorized to take the money.

Q. That is what it says, "I hereby certify that any sums withdrawn by T. R. Sheridan from my balance on deposit with the First National Bank of Roseburg, Oregon, were duly authorized by me." You understand that, don't you?

A. That says that way; that don't say that I authorized him.

Q. You signed it?

A. I signed it later.

Q. Was it true?

A. He said to me——

Q. Never mind——

MR. REAMES: Let him finish his answer.

COURT: The answer is not responsive; you can bring it out on re-direct.

(Testimony of W. J. Carlon.)

Q. I asked you if what you signed there was true; was it true that you had duly authorized him to take this money?

A. I hadn't authorized him to take it; I signed that way because he insisted on it.

Q. You signed a statement—deliberately signed a statement that you knew wasn't true?

A. Because he——

Q. Do you want the jury to understand that; that you deliberately signed a statement that you knew wasn't true?

A. I did sign a statement that I knew wasn't true.

Q. Why did you do it?

A. Because he insisted on it.

Q. What did you think he wanted to use it for?

A. He told me it was all right; it was on their form.

Q. Form for what?

A. Just to satisfy this man Goodheart.

Q. Satisfy the Bank Examiner?

A. Yes.

Q. Then what you want this jury to understand is, that you deliberately signed a writing that was to be used to deceive the Bank Examiner—that is what you want the jury to understand, is it; that you deliberately signed a writing that was to be used to deceive the Bank Examiner?

A. Well, I didn't know who it would deceive.

Q. You have just told us that he wanted to use it with the Bank Examiner and you knew it wasn't true, you say. Do you mean, Mr. Carlon, to have this jury

(Testimony of W. J. Carlon.)

understand that if a man told you he wanted to deceive a Bank Examiner or a bank and wanted, therefore, you to sign a false statement in order that he might use it for that purpose, that you would sign it?

A. I signed that at the request of Mr. Sheridan.

Q. You would sign at his request a false statement to swindle somebody else or deceive them?

A. Yes, I accepted them notes and after he checked my bank book he gave me those checks there——

Q. Yes, now, Mr. Carlon——

A. —but he gave them to me and I accepted them all——

Q. You had those notes——

A. —because I had known him for a long time and transacted business with him——

Q. You took these——

A. —and I had faith enough in him to think that he would not——

COURT: This is not responsive to any question.

MR. REAMES: It is answering to a question asked him.

COURT: This witness's answers are entirely argumentative, out of place in a court room; if it weren't for his age I would not tolerate it.

Q. Mr. Carlon, when he gave you these notes you accepted them?

A. I did, finally.

Q. And you held these notes and put them into the hands of an attorney to collect, didn't you?

(Testimony of S. A. Sanford.)

A. I did later, in Mr. Eddy's hands for a short time.

Q. Whose hands.

A. Mr. Eddy's hands for a short time and he had them to correspond right to Portland here where he was on 124 Third Street——

Q. I asked you in whose hands he put them?

A. Had his communication with Mr. E. B. Duffy.

Q. Eddy gave them to E. B. Duffy, or did you?

A. He wrote them and he refused to answer the attorney, and later I had J. H. Booth interview him in regard to my contention and he sent one hundred dollars.

Q. Interview Mr. Sheridan?

A. Yes.

Q. Then you were trying to collect those notes of Mr. Sheridan?

A. I wanted to collect, of course; I made up my mind, I didn't have a penny. I wanted to collect, of course.

S. A. SANFORD

Recalled, testified as follows:

DIRECT EXAMINATION BY MR. REAMES:

COURT: Is he to prove anything but the transfer of the accounts, Mr. Reames?

MR. FULTON: We will admit the transfer.

COURT: Do you expect to prove anything but the transfer?

(Testimony of Charles C. Verrell.)

MR. REAMES: No, if the court please, except that after both of them appear the words, "Loan, one thousand dollars"; that is all.

MR. FULTON: It will show, just what it does, we can refer to the accounts, he need not prove it.

MR. REAMES: Then the Government will offer in evidence that part of the individual ledger at page 519 showing the debit claim under date of April 7, 1911, and the individual ledger page 519 showing the charge of \$500 April 27, 1911.

MR. FULTON: All right.

MR. REAMES: The first one was a thousand dollars. That is all, Mr. Sanford.

CHARLES C. VERRELL

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES:

I live at Roseburg and am a son of witness, Laura M. Verrell. I have lived at Roseburg since 1891 and until August, 1910, have been the business manager for my mother in Roseburg. I had a conversation with Thomas R. Sheridan in August, 1910, prior to the time that the Crouch loan, \$4,000 was paid. I was going to leave Roseburg and dropped into the bank one day and I told Mr. Sheridan when that was paid in, if he knew of any good loans, to let me know. I told him

(Testimony of B. C. Agee.)

I would like to investigate the security myself. Mr. Sheridan said "all right," or some words to that effect. I don't remember just exactly what the answer was. I never had any subsequent conversation with him about it. I left Roseburg about the middle of August, 1910, and only made occasional trips home, and was not in a position to attend to the business of my mother or to examine the character of the security after that. I do not know anything about what arrangements my mother made.

(The defendant offered in evidence a letter written by Mrs. Laura M. Verrell to the defendant, and the same was received and marked as defendant's exhibit No. 5.)

B. C. AGEE

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I have lived at Roseburg, Oregon, since 1869, and have known the defendant for 40 or 45 years. I am engaged in the farming and stock business. During March, 1911, and prior thereto, Mr. Sheridan and I were in the orchard business, in the farming business. He was partners with me in the orchard and farm. The note of date March 4, 1911 (Government's exhibit No. 6), signed B. C. Agee by T. R. S., in favor of one

(Testimony of B. C. Agee.)

David Hull, I never signed. The first time I ever saw that note was after Mr. Sheridan had made an assignment, which was the first time that ever I knew it was against me, when they fetched the notes up in the assignment. Prior to that time I did not have any notice or knowledge of its execution. I never had any talk with Mr. Sheridan, in which I told him to sign that note for me. I never had any talk for him to sign the note that ever I knew of. Here was the first time I ever knew the note was against me.

CROSS EXAMINATION BY MR. FULTON:

Mr. Sheridan and I were partners and he was looking after the financial part of it. I never recognized his right to sign my name to a note. But where the money was put to my credit I have an idea I would recognize the right maybe, I don't know.

Q. And if he had told you just about the note, why it would have been all right; you would have considered it all right, wouldn't you?

MR. REAMES: The government objects on the ground it is immaterial.

MR. FULTON: I think it is material to show their relations, what he recognized the situation to be between themselves as to showing intent.

COURT: Yes, but what he would have done——

MR. FULTON: I mean, what he would have recognized. Supposing he hadn't, it would seem ma-

(Testimony of B. C. Agee.)

terial—pardon me for sitting down and talking to the court.

COURT: Certainly.

MR. FULTON: It would seem material, it would go and be material to show or as tending to show what their relations were and what his recognized rights were, even though he had never told him to do this particular thing, if the relations were such that he would have approved it. It seems to me it would have gone to the intent, the other party knowing, and you know it is already proven that this was carried into his account, the money was carried into his account. The Government has proven that.

COURT: I think you can show fully what the relations were and what authority he had exercised up to that time, but to ask the witness to state now what he would have done in case a certain thing were done three years ago or more, I think is scarcely competent.

MR. FULTON: All right, I note an exception.

COURT: Yes.

Q. Now, Mr. Agee, I ask you if you haven't—I don't remember the names of the persons, but if you haven't said to many people in Roseburg many times since this occurred that whatever Mr. Sheridan did in respect to using your name in that matter was with your authority, he had a right to do so in transacting the business?

(Testimony of B. C. Agee.)

MR. REAMES: The Government objects; there is no proper foundation laid for the impeaching question.

COURT: I think you will have to state the——

MR. FULTON: That is not impeaching, Your Honor, necessarily; it is agency, and I suppose you can prove agency by the declaration of the principal any time.

MR. REAMES: Yes, but if the court please, before he should be asked a question such as that, whether the counsel says it is impeachment or not, it is impeachment or is a statement out of court contrary to his testimony in court, he should first call his attention to the time and place and persons, so that the witness may have an opportunity to explain.

MR. FULTON: That would be the rule if it was an impeaching question. There are many questions that impeach because they contradict, but this is for the purpose of establishing agency, and any declaration of a principal as to agency, as I understand the rule, is admissible whether before or after the fact, as far as the declaration of the principal itself is concerned. Now, I am asking for declarations he had made as tending to show the agency.

COURT: I think the testimony is impeaching in its nature, so far as this particular witness is concerned. You might prove it by the other witnesses. I will pass on that question when we come to it, but as to this particular witness I think the testimony is of an impeaching character.

(Testimony of B. C. Agee.)

MR. FULTON: Save an exception, if the court please.

Witness continuing: I never looked to see whether any of this money went into my account. I pretty generally approved of whatever Mr. Sheridan did, in managing my affairs.

BY MR. FULTON: Now, do you remember, Mr. Reames, the amount they said the debit balance was—the amount he was indebted at the time?

BY MR. REAMES: \$229 an overdraft.

Witness continuing: If I had know that I was owing the bank \$229 and this was borrowed in my name and put into my account, I don't know what I would say about Mr. Sheridan's authority to do that. I would not want him to sign a note. I would want to sign it myself. It makes a difference, of course, if the money went into my account. But I would like to sign the note myself.

Q. I am not talking about signing the note, I am talking about taking the money and paying it into your account. It shows, as far as that is concerned, it was signed by Mr. Sheridan?

A. Yes.

Q. It wasn't an attempt at a forgery; he put it in your name by himself and he put the money in your account?

A. Yes.

Q. That was all right, wasn't it?

A. Yes, that would be all right, I guess.

(Testimony of J. E. Haney.)

Q. Well, you would not feel that he was doing you an injustice or wrong in doing that?

A. Well, it would not look that way.

J. E. HANEY

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES:

I formerly lived in Douglas County for 35 years. I was engaged in the farming and stock raising business. I knew T. R. Sheridan for 35 years and from the year 1908 I had a deposit in the First National Bank at Roseburg. I had a conversation with Mr. Sheridan in 1910 about loaning my money. I had about \$5,000, perhaps a little more than that, on deposit. The money had been there for two or three months and I decided it was not doing me much good just laying there. I didn't know as I would want to use it right away and I asked Mr. Sheridan if he could loan it for me, so that I could get some interest out of it, and he said he could, and I said, "How about—can you give a good security?" and he said, "Any loan I make, I will O.K. it myself." He said, "Will that be all right?" and I said "It will." He did not ask to borrow it himself.

(The Government offered and there was received in evidence a memorandum check of date May 24, 1911, for \$5,000 against the account of J. E. Haney, upon the

(Testimony of J. E. Haney.)

First National Bank of Roseburg, the defendant admitting that the instrument, with the exception of the printed portion thereof, is entirely in the handwriting of the defendant, and the same was marked Government's Exhibit No. 15.)

Witness continuing: I did not write that memorandum check. Did not ever tell Mr. Sheridan to write it. I don't remember when I got that memorandum check, but I didn't understand it when I got it. I didn't really know just what it was. I was about 37 miles from Roseburg when I received it, and it was two or three months later that I again saw Mr. Sheridan.

The Government offered and there was received in evidence a promissory note of date May 24, 1911, in favor of J. E. Haney, in the sum of \$5,500, with interest at six per cent, payable on demand, the defendant admitting that the instrument is entirely in the handwriting of the defendant. It was marked Government's Exhibit No. 16.

Witness continuing: I never seen this.

Q. You never saw the note?

A. No.

Q. Did you ever see this note before I handed it to you at this time?

A. No.

CROSS EXAMINATION BY MR. FULTON:

When I talked to Mr. Sheridan I said I would like to have him do something with that money that would

(Testimony of J. E. Haney.)

bring me in some interest, or words to that effect, and asked him if he could loan it for me, and he told me that he could, and that any loan he made he would O.K. That is, he would be personally responsible for it, I understood. That is the substance of what was said.

Q. Now, you understood from that that he had a right to take your money and invest it as he saw fit, did you not?

A. Well, I don't hardly know.

Q. Well, now, didn't you feel that the money was in Mr. Sheridan's hands by that arrangement—didn't you feel that, and wasn't that really your understanding, that the money was there in Mr. Sheridan's hands?

A. Yes, when I gave him authority to loan it, I suppose.

Q. It was in his hands?

A. Yes, sir.

Q. And consequently of course he had a right to take it from the bank for the purpose of loaning it and he could not loan it otherwise; you understood that, didn't you?

A. I supposed I would have to check it out for him.

Q. You say you supposed you would; you had told him to take it and use it, hadn't you? Hadn't you?

A. I told him to loan it for me.

Witness continuing: In October, 1914, at Marshfield, Mr. Bennet wanted my deposition, as I was going away, and he got me to come to his office and make a statement.

(Testimony of S. A. Sanford.)

(The defendant offered and there was received in evidence the affidavit of the witness. It was marked Defendant's Exhibit No. 6.)

Witness continuing: There is one word in there that I don't remember of saying, "To use it." I never read the affidavit until a short time ago, but it was read to me by Mr. Bennet before I signed it. I told Mr. Sheridan to loan my money for me. With the exception of that phrase the affidavit is correct.

(It was admitted that no representative of the Government was present when the deposition was taken and that the Government had no notice that it would be taken.)

Witness continuing: When I received the memorandum check I didn't understand it, thought my money was still in the book and checked against it.

S. A. SANFORD

Being recalled testified on behalf of the Government as follows:

DIRECT EXAMINATION BY MR. REAMES:

COURT: Do you expect to prove anything more than the transfer of the account?

MR. REAMES: I expect to prove the transfer of the money and that thereafter the witness overdrew his account, for the purpose of corroborating his testimony,

(Testimony of S. A. Sanford.)

as to the fact that he didn't know his money had been withdrawn.

MR. FULTON: I don't think it is corroborating to show the mere fact that he had an overdraft. He says he supposed it was there and drew against it, but I don't know that that corroborates his testimony, the mere fact that he had an overdraft. Many men have an overdraft, they might say their intention was so and so, but that don't prove it.

COURT: You admit the transfer of the account?

MR. FULTON: Yes, the transfer of the money.

COURT: Will the books show that checks were in fact drawn?

MR. REAMES: The books will show that checks were drawn.

COURT: And honored?

MR. REAMES: And honored; and honored by creating an overdraft.

COURT: I will permit you to prove that.

Witness continuing: On page 605 of the individual ledger at the account of J. E. Haney, the item dated May 24, 1911, shows a charge of \$5,500; the notation after it is, "To T. R. S.," which means T. R. Sheridan. After that six checks were drawn against the account, which put the account \$170.50 in overdraft. On July 12 a \$300 check came in and was charged to his account, overdrawing it \$170.50, and on July 13 \$200 placed to his credit took it up. It was there for one day, really,

(Testimony of W. E. Chapman.)

the overdraft. On July 12th Haney's account showed a credit of \$28.

CROSS EXAMINATION BY MR. FULTON:

Witness continuing: After July 12th there were other deposits to the credit of Haney's account; there was one deposit of \$200 and also another one of \$700. The first was made on July 13th and the second on July 24th.

W. E. CHAPMAN

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES:

I live 15 miles from Roseburg. I am a farmer by occupation. I have known Mr. Sheridan all my life. I have been for a long time a depositor of the First National Bank. I had very nearly six hundred dollars in the bank in January, 1911; I put enough in to make even up \$600.

MR. REAMES: Before I go any further with this testimony, if the court please, in fairness I should say to the Court this is not an indictment count.

MR. FULTON: Well, then, we will object when you ask another question. Wait until then.

Q. What conversation, if any, did you have with Mr. Sheridan about loaning your money?

(Testimony of W. E. Chapman.)

MR. FULTON: I object to that, if the court please, what conversation he had as to loaning his money. He is not one of those named in the indictment and I don't know that I can add anything to what I have suggested to the court as to my views on this question.

(Argument by counsel.)

COURT: I realize when outside transactions of this kind are gone into the defendant is placed at a disadvantage, especially where the trial takes place at a long distance from where the transaction occurred, but the intention of fraud on either the banking association, or some other person, is an essential part of this crime, and in my opinion the amount of money drawn out would have some bearing, at least, upon that question, and I think the testimony is competent. I will give the defendant every opportunity to meet it in the course of the trial, but I think the testimony is competent upon that one issue. I will instruct the jury now, however, that this has no bearing upon the question whatever as to whether or not he was authorized to check out the money of these other persons, and you must not consider the testimony in that light. You can only consider its bearing upon the question as to whether or not the defendant intended to defraud the banking association or any other person or persons.

MR. FULTON: I thank the court for that instruction, and I am going to ask the court if I am correct in this, that there are two elements of this crime, both of which they must find against the defendant; namely, first, that he took this without authority——

(Testimony of W. E. Chapman.)

COURT: Yes, the want of authority, and criminal intent.

MR. FULTON: Now then, even if they should find he took without authority, that would not necessarily constitute the offense, unless they also find he took it with criminal purpose; therefore they must first find whether he had authority. Now, as Your Honor says, and I think that is fully explained, this testimony can only be considered if they should find that he took this other without authority—that he took Carlon's and these other people in the indictment, the mere fact that Sheridan took these can be considered only for the purpose of finding what his intent was. I understand we have an exception?

COURT: Yes, you have an exception to all the testimony.

MR. REAMES: I would like permission of the court to make a statement, and may I have just a word?

COURT: Yes.

MR. REAMES: I think Your Honor will bear in mind, and counsel will admit, that at the hearing on demurrer in open court, defendant and counsel being present, I then and there offered to the defendant to give a bill of particulars if he should want one. I renew the offer at this time, so they will not be taken by surprise.

MR. FULTON: Counsel is quite right, he offered to give us a bill of particulars, that was to aid the indictment. We were talking about the indictment. I

(Testimony of W. E. Chapman.)

never heard anything about these things at that time, he didn't mention anything about these people. I didn't know what a bill of particulars meant, I supposed the bill of particulars that he proposed was simply what was in the indictment.

MR. REAMES: Of course the names of every one of these witnesses was on the indictment.

MR. FULTON: That might be, they might be on the indictment, but there was nothing of what they said or what they were there for. I think I will ask to have the statement of counsel stricken out.

COURT: Yes, the jury will be guided simply by the testimony and not by what counsel might say.

Witness continuing: I had a conversation with Mr. Sheridan about loaning my money; I went in and told him that I would like to have enough money in there to loan and I said, "I will place enough in there to make it even up six hundred dollars." When I first went in I said, "Tom, I would like to loan the money I have in the bank." And I said, "I have put enough in to even up six hundred dollars." Tom said, "I can loan it for you." And that was all that was said about it. After that I had a chance to loan my money, and after the transfer was made into the other bank, just about the time they were transferring, I went to the other bank and called for my money. It was at this time that I first found out that I didn't have any money in the bank; this was after the consolidation of the two banks.

(Testimony of M. S. Doerstler.)

“(The Government offered and there was received in evidence a memorandum check of date January 18, 1911, upon the account of W. E. Chapman, at the First National Bank, in the sum of \$600, the defendant admitting that the document is wholly in the handwriting of the defendant. It was marked Government’s Exhibit No. 17.)

Witness continuing: I have now examined this memorandum check; and I never signed it.

BY MR. FULTON: You understand our objection goes to all these?

COURT: Yes.

Witness continuing: The first time I ever saw this memorandum check, this Government’s Exhibit 17, was here in the court room last Sunday. I saw Sheridan after the consolidation of the two banks, and I said, “Tom, where is my money that has not been transferred?” and Mr. Sheridan says, “I will look after it and straighten it up for you.” That was the first conversation. There was nothing said at that time about him borrowing the money himself. I never received any note for the money.

MOSES S. DOERSTLER

A witness called on behalf of the Government, testified as follows:

(Testimony of M. S. Doerstler.)

DIRECT EXAMINATION BY MR. REAMES:

BY MR. REAMES: This testimony, if the court please, of Moses S. Doerstler, forms the basis of counts two and six of the indictment.

Witness continuing: I live at Marial in Curry County, Oregon, and have lived there since 1898. Marial is on the coast and is 73 miles from Roseburg. Between my home and Roseburg there is a range of mountains. I am 54 years old and my occupation is that of carpenter and miner. I have been banking with the First National Bank since 1898. I had a conversation with Mr. Thomas R. Sheridan in the spring of 1908 in the bank at Roseburg. I told Mr. Sheridan that I would like to have interest on my money I had there in the bank and I did not like to have it tied up any length of time on account may want to use it and invest it and he told me then he would give me six per cent interest and any time within thirty days' notice he would have the money ready for me. I don't know how much money I had in the bank at that time. I did not then know and do not now know Mr. Warren P. Reed of Gardiner.

Q. Here is a memorandum check of date March 22, 1911, for \$530, marked to W. P. Reed. I will ask you to examine that and state whether or not you wrote it.

MR. FULTON: We don't contend that he wrote it.

A. Who wrote it?

(Testimony of M. S. Doerstler.)

MR. REAMES: Of course nobody contends that he wrote that.

Q. Did you write that?

MR. FULTON: There is no use taking up time asking him, because those checks are in Mr. Sheridan's handwriting.

MR. REAMES: It is admitted that this memorandum check is entirely in the handwriting of the defendant, T. R. Sheridan, with the exception of the printed part?

MR. FULTON: Yes.

MR. REAMES: The Government will then offer it in evidence.

COURT: Admitted.

Marked GOVERNMENT'S EXHIBIT 18.

MR. REAMES: This, gentlemen of the jury, is similar to the others, dated March 22, 1911, written in lead pencil, marked "Charge M. S. Doerstler, \$530."

Q. Now, there was this one conversation that you had with Mr. Sheridan; did you ever have any other after that about him loaning your money?

A. No.

Witness continuing: Afterwards, of course, I told him all right, he should go ahead and loan the money. I had no other conversation with him about loaning my money for me.

(Testimony of M. S. Doerstler.)

(The Government offered and there was received in evidence a memorandum check of date April 27, 1911, for \$260 against the account of Moses S. Doerstler at the First National Bank, the defendant admitting that, with the exception of the printed portion the instrument is in the handwriting of the defendant, the Government stating that the instrument formed the basis of count No. 6 of the indictment. It was marked Government's Exhibit No. 19.)

Witness continuing: I did not write that memorandum check. The first time I saw Government Exhibit No. 18 and Government Exhibit No. 19 was when I got the statements from the bank. I do not remember when that was, but I usually get statements once a year. With reference to the promissory note of date April 27, 1911, for \$260 payable on demand, with interest at six per cent, signed T. R. Sheridan, I don't know as I seen the note, but I heard there was notes out. It may have been in the fall of 1912 when I first heard of that note. I never had possession of it. I first heard of it as being in the safe of Mr. Coshow, who is a lawyer at Roseburg, and the attorney for S. A. Sanford, Trustee of the First National Bank, in liquidation.

(The Government offered and there was received in evidence the note of T. R. Sheridan of date April 27, 1911, and the same was marked as Government's Exhibit No. 20.)

Witness continuing: With reference to the endorsement on this note, "May 6, 1911, paid on this to Russell

(Testimony of M. S. Doerstler.)

\$250.” I understand that transaction. I know who Russell is; he lived at Wilbur; I bought a farm from Russell in Curry County and of course called on Mr. Sheridan for the money to pay for it. I didn’t give him any thirty days’ notice. I came out and wanted to make the deal right away. Then Mr. Russell—they changed the account of the bank—Mr. Sheridan couldn’t get the money right away and then we changed the account from the bank to Mr. Sheridan, to pay up the balance of the amount I was to pay for the farm. I paid \$450 down in cash and Mr. Sheridan assumed responsibility for the balance, which was the same as a payment to me. It is my understanding that there is only due on this particular \$260 note the sum of \$10. With reference to this other transaction of \$530 by which it appears that on March 22, 1911, \$530 of my money was withdrawn by Mr. Sheridan and credited to W. P. Reed, I never received any note of that transaction.

BY MR. REAMES: We will prove by the witness Sanford that that has been paid.

MR. FULTON: Of course it has been paid. It was loaned to Mr. Reed and paid by Mr. Reed.

COURT: There is no need of offering any further proof of payment then.

Witness continuing: In regard to the memorandum check of date April 8, 1908, signed M. S. Doerstler, marked draft \$1,000, and a promissory note of the same date, \$1,000 signed T. R. Sheridan, in favor of M. S.

(Testimony of M. S. Doerstler.)

Doerstler, I have never seen the note. Of course I didn't know about the memorandum check. I don't know why I would have this note.

BY MR. REAMES: This is not one of the indictment counts so your objection may go to this.

MR. FULTON: It will be understood?

COURT: Yes.

(The Government offered and there was received in evidence the note and the memorandum check, the defendant admitting that they are both entirely in the handwriting of the defendant. They were received and marked as follows: memorandum check was marked as Government's Exhibit 21; the note was marked as Government's Exhibit 22.)

BY MR. FULTON: At this time it is understood I have an objection to all these matters that are introduced as similar transactions, but there was one objection that I didn't make that I ought to make, I think, to have it in the record and in fairness to bring it to the knowledge of the court; it seems to me that transactions that are three or four years separated from the transactions that form the basis of the indictment are too remote, too far apart. The Chapman transaction would perhaps not be subject to this same objection, but no matter, I think the rule is in all—running entirely throughout the doctrine of similar acts that they must be on or about the same time. That is, that they must be closely associated so as to—or else they afford no proof.

(Testimony of M. S. Doerstler.)

COURT: That would go to its weight rather than to its competency.

MR. FULTON: They are material, of course, in regard to this, because this witness testified he had his conversation in 1908 with Sheridan and that might make a little difference in that.

COURT: The objection will be overruled; you will be allowed an exception.

Witness continuing: This note, Government's Exhibit 22, of date April 8, 1908, for \$1,000 bears two endorsements, one December 15, 1910, paid to Russell, \$500, one April 15, 1911, paid to Russell \$500. I know nothing about those two endorsements.

The Government offered and there was received in evidence a memorandum check on the First National Bank of Roseburg Oregon, against the account of M. S. Doerstler, of date May 1, 1908, for \$469, and a note of the same date, in the same amount, to B. C. Agee, the defendant admitting that the note and memorandum check are entirely in the handwriting of the defendant. They were received and marked as follows: memorandum check marked Government's Exhibit No. 23, note marked Government's Exhibit No. 24.

Witness continuing: I don't know anything about the note. I did not know B. C. Agee at the time of this transaction. I met him for the first time at the Grand Jury last February a year ago. I didn't know that I had his note. Didn't know there was a note.

(Testimony of M. S. Doerstler.)

COURT: You say you have no evidence this was abstracted from the bank?

MR. REAMES: Of this?

COURT: This is the note, you say?

MR. REAMES: I have this evidence; I don't have the memorandum check on this particular transaction, but I have the book entry showing what became of the money.

MR. FULTON: Is it Mr. Sheridan's handwriting.

MR. REAMES: It is admitted that this note is entirely in the handwriting of the defendant Sheridan?

COURT: Admitted.

MR. REAMES: The Government will offer it in evidence, dated March 30, 1909.

MR. FULTON: Is that mentioned in the indictment?

COURT: No. You will be allowed the same objection and same exception, Senator.

Marked GOVERNMENT'S EXHIBIT 25.

MR. REAMES: This is similar to the others, a pencil note of March 30, 1909, promissory note, pay M. S. Doerstler \$500 on demand. The Government will admit that the printed matter and of course the bank stamping is not in the handwriting, but all of the pencil marks there are in the handwriting of the defendant Sheridan?

COURT: Yes.

(Testimony of M. S. Doerstler.)

Witness continuing: I did not know and do not know any man by the name of A. M. Kelsay. In regard to the memorandum check of date May 10, 1910, signed M. S. Doerstler, by T, for \$1700, I know nothing of that transaction.

(The Government offered and there was received in evidence the memorandum check, the defendant admitting that with the exception of the printed matter, the document is entirely in the handwriting of the defendant. It was marked as Government's Exhibit No. 26.)

Witness continuing: In regard to the promissory note for \$1,000, of date May 5, 1910, purporting to have been signed by Mr. Sheridan, another one of the same date, purporting to have been signed by A. M. Kelsay, by T. R. S., I have now examined these notes and this is the first time that I ever saw them.

The Government offered and there was received in evidence the promissory note of date May 10, 1910, signed A. M. Kelsay, by T. R. S., a demand note for \$700, the defendant admitting that the document is, with the exception of the printed matter, entirely in the handwriting of the defendant. It was marked as Government's Exhibit No. 27. The Government offered and there was received in evidence the promissory note of date May 5, 1910, due on demand, to M. S. Doerstler, signed by T. R. Sheridan, the defendant admitting that it is entirely in the handwriting of the defendant, with the exception of the printed matter. It was marked as Government's Exhibit No. 28.

(Testimony of M. S. Doerstler.)

Witness continuing: In regard to the note dated the 10th month and 6th day, 1909, signed A. M. Kelsay by "T.R.S.," I have now examined this note and this is the first time I ever saw it.

The Government offered and there was received in evidence the promissory note dated 10/6/09, payable to M. S. Doerstler, signed A. M. Kelsay by "T.R.S." for \$1,000, the defendant admitting that the document is, with the exception of the printed matter, entirely in the handwriting of the defendant. It was marked as Government's Exhibit No. 29.

Witness continuing: When I was in Indiana I received a letter from the Bank Examiner, but didn't take much thought to it. I signed the clause at the bottom. When I received it through the mail in Indiana of course I read it over; I didn't put any thought to it really. I did not understand what it was, what it meant, really. I simply signed it and sent it back.

CROSS EXAMINATION BY MR. FULTON:

Witness continuing: When I went to Mr. Sheridan to see about loaning my money I found him at his bank. I spoke to him about putting my money out and that I would like to have it put out so that it would be drawing interest. I met him in the bank and said I would like interest on my money that is in the bank. I told him I didn't like to loan it out and have it any length of time and have it tied up but I might want to invest or use it. Then he told me he would give me six per

(Testimony of M. S. Doerstler.)

cent; he would loan it out for me and give me six per cent interest and any time within thirty days' notice, why he would get the money for me to use, so that I would have it to use. Of course I thought that was all right. He said he would loan it out for me. I do not remember that he said anything about taking it and giving me six per cent interest. I supposed the bank was responsible; I had made the arrangement with Mr. Sheridan. I expected Mr. Sheridan by that authority that I gave him that he had a right to take the money out and loan it. But if the bank loans money they usually have good security. I didn't care whom he loaned it to; I left that to his judgment. I did not expect him to report to me anything about it; it is not true that most of the money has been repaid to me. I got my statements from the bank once a year from the time I commenced depositing there. When I got the bank statement I would get these memorandum checks and I supposed that he had loaned that money for me. I did not know that these notes were left in the bank and knew nothing about what arrangement was made about the notes. In regard to the note, there is a payment endorsed upon it of \$1,000, being two payments of \$500 each. I do not understand it unless it was paid to Mr. Russell on the land transaction. I don't know whether it is paid or not. I know nothing about the other note that has an endorsement upon it, July 20, to Russell, \$500. My bank statements did not show the payments to Russell. I do not have a bank book; I was back in Indiana when I signed the statement for

(Testimony of M. S. Doerstler.)

the Bank Examiner; I received it through the mail; I read it over before I signed it and knew where to sign. To tell the truth about it, I didn't read it carefully; I didn't have no notes to show for the amounts, didn't have my statements with me and didn't know whether it was right or not. I understood that Mr. Sheridan had told the Bank Examiner he had made these loans out of my account, I understood that, but I didn't give much thought to it. I didn't understand and I just simply signed it. I didn't know where there was any notes out there. I have now read the statement and release over since I have been on the stand and I understand it now, but didn't then. It is just the same now as it was then but I didn't give it any thought. It is not true that the first time I discovered I didn't understand it was when I concluded that I wanted to sue the bank. I am getting ready to sue the bank now and concluded to do so last winter; I forget what date it was; it was about the first of January, 1915.

Q. Then you concluded you hadn't understood this letter, didn't you?

A. Yes.

Witness continuing: I filed a claim against Mr. Sheridan, against the Trustee, for this money.

Q. In the Roseburg Hotel last fall, I can't fix the date, but sometime last fall, when Taylor was present and Watson was present and you were talking then about this money that you had—that Mr. Sheridan had loaned—taken—and did you not then and there say that you had loaned this money to Sheridan and that

(Testimony of M. S. Doerstler.)

it was your money and it was nobody's business whether you got it back or not?

A. I don't remember that.

Q. Or words to that effect? Will you say that you didn't make that statement?

A. I don't remember.

Q. You don't remember anything about that?

A. Not about that, no.

Q. You have no recollection of making any such statement at all?

A. All that I ever said of Mr. Sheridan, he has promised me time and again if he got through with this case here he would square up all those accounts. But that must have been what I said, I don't know what else it was.

Witness continuing: I understood as I received certain bank statements from the bank, which have now been shown to me, that Mr. Sheridan was making loans for me.

(The defendant offered and there was received in evidence three bank statements, identified by the witness. They were marked defendant's exhibits 7a, 7b, and 7c.)

RE-DIRECT EXAMINATION BY MR. REAMES:

In regard to the conversation which I had with Mr. Sheridan about loaning my money, in 1908, I never had any other conversation with him about loaning my money and I have told the entire conversation.

(Testimony of S. A. Sanford.)

S. A. SANFORD

Recalled as a witness on behalf of the Government, testified as follows:

By the witness: The individual ledger at page 272, under date of April 8, 1908, at the account of M. S. Doerstler, shows a charge of \$1,000 against Mr. Doerstler's account. The memorandum check of the same date is in Mr. Sheridan's handwriting. By this transaction \$1,000 was taken from the account of M. S. Doerstler on that day. On the individual ledger at page 272 under date of May 1, 1908, there is a notation, "to B. C. Agee Account \$469 charge." On the individual ledger at page 6, in the B. C. Agee account, under date of May 1st, 1908, there is a credit entry on the account of B. C. Agee for \$469.

(The Government offered and there was received in evidence a deposit slip, showing that on May 1, 1908, \$469 was credited to the account of B. C. Agee, the defendant admitting that the document is entirely in the handwriting of the defendant. It was marked Government's Exhibit 30.)

It was admitted by the defendant that each of the transactions that was testified to and identified by memorandum checks, when Mr. Doerstler was on the stand, represents and were transactions whereby the money on the date that the memorandum checks bear date went out of the account of the depositor Doerstler and into the accounts of those persons mentioned in the

(Testimony of S. A. Sanford.)

deposit slip in each of the cases where Mr. Sheridan put in a memorandum check.)

Witness continuing: In the second individual ledger at page 268, the account of M. S. Doerstler, under date of March 30, 1909, is charged with \$500.

MR. REAMES: Here is another that we have no memorandum check for, which is Government Exhibit No. 29, the note being on demand.

MR. FULTON: How do you get the transfer of this, what was there for it, to show the transfer?

MR. REAMES: On that day the account of M. S. Doerstler was charged.

MR. FULTON: I know you have the account charged.

MR. REAMES: And the note.

MR. FULTON: But that really doesn't prove anything without showing there was something put in there authorizing the transfer. The mere fact that the account is charged by some other person doesn't prove anything. The only reason I raise the question is because I want to see just what manner of authority was given for making the transfer.

MR. REAMES: This one, Government's Exhibit No. 25, Your Honor, is the first one where we haven't had the memorandum check. It is a note dated March 30, 1909, written to M. S. Doerstler.

MR. FULTON: It is not one that is in the indictment, Your Honor.

(Testimony of S. A. Sanford.)

MR. REAMES: For five hundred dollars.

COURT: How is the note signed?

MR. REAMES: The note is signed T. R. Sheridan and it is admitted that the note is in his handwriting. Now, the only way we have of connecting that up with the checks is that on that same day the account of Mr. M. S. Doerstler, the depositor, was charged with that sum of money.

COURT: Yes, but you haven't the check here and no proof whatever as to how it came to be drawn out. It is no evidence against this defendant.

MR. FULTON: It is not a mere incident at all.

COURT: No.

MR. FULTON: That I would object to.

COURT: I will sustain the objection as to the two notes where there is no memorandum checks.

MR. REAMES: I have a little more proof on the notes, if the court please.

Witness continuing: This note of M. S. Doerstler payable to M. S. Doerstler for \$1000, dated 10/6/09, in the handwriting of the defendant, signed A. M. Kelsay by "T. R. S.," Government's Exhibit No. 29 and a deposit slip under date of 10/6/09, for \$1000, bearing paid stamp of the bank of October 6, 1909, by that transaction \$1,000 was on that day deposited to the account of A. M. Kelsay.

The Government offered in evidence and there was received without objection the deposit slip for \$1000,

(Testimony of C. E. Marks.)

in the handwriting of the defendant, and it was marked as Government's Exhibit 31.

Witness continuing: At page 541 of the individual ledger under date of March 22, 1911, at the account of M. S. Doerstler, there appears the entry of a charge of \$530, with the notation "Reed;" that was Warren P. Reed, one of the directors of the bank at the time, and Reed subsequently paid it.

C. E. MARKS,

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES:

I am 73 years old and live at Roseburg; I am a farmer by occupation. I have known Mr. Sheridan 30 or 40 years. Have done business with the First National Bank in Roseburg since it was first established. I had a talk with Mr. Sheridan about loaning my money that was in the bank. There have been a good many loans made there. The two notes that is not paid there now is a memorandum check for \$500 loaned—supposed to be loaned to Mr. Agee—and a note of \$2,000 loaned to Mr. Sheridan, is all; I suppose it is to himself. There are two notes that have not been paid. In regard to this memorandum check of date July 27, 1908, marked "T. R. S. \$2,000," that must be to Sheridan. I seen that in my bank book when it was returned written up. I

(Testimony of C. E. Marks.)

don't remember when that was. When I thought there was some business down there that required to have it written up I had it written up but I would not get it by any means every month.

The Government offered and there was received in evidence the memorandum check, the defendant admitting with the exception of the printed matter it is entirely in the handwriting of the defendant. It was received and marked as Government's Exhibit No. 32.

Witness continuing: In regard to the promissory note of the same date for \$2,000, signed T. R. Sheridan, payable to me, on demand, with interest at 7 per cent, I first saw that note about a year and a half after the Douglas National Bank and the First National Bank were consolidated. Mr. Sheridan wanted them notes, in fact all of these papers that are there he handed to me; that is the first I ever seen them. That must have been in the years 1912 or 1913 when I saw this note for the first time. In regard to the notation on the memorandum check and the notations on the back of the note, showing interest paid in 1909 and in 1910, I can explain them. The time the last interest was paid there was only—this note was in the First National Bank and that memorandum check was for—the note itself was laying in the First National Bank of Roseburg at that time. That was paid; that the interest was paid on it, and Mr. Sheridan he took out the interest off of that marked interest paid on the memorandum check. Aside from those two payments of interest, the balance of this promissory note at this time remains unpaid.

(Testimony of C. E. Marks.)

The Government offered and there was received in evidence the promissory note, the defendant admitting that with the exception of the printed portion thereof it is entirely in the handwriting of the defendant. It was marked Government's Exhibit 33. It was admitted that on the day the check bears date that that amount of \$2,000 was taken from the account of the depositor.

It was admitted that the note and memorandum check, each bearing date February 23, 1910, are in the handwriting of the defendant. The Government offered the note and memorandum check in evidence and they were received and marked as follows: The memorandum check was marked Government's Exhibit No. 34 and the note was marked Government's Exhibit No. 35.

Witness continuing: In regard to the first note for \$500 of date February 23, 1910, I seen that note the same time as I seen the other note. They were all in the First National Bank a year and a half after they were closed up; that is, a year and a half after the Douglas National Bank took charge, which would be probably in 1913, I saw that note for the first time. The agreement was it was loaned to Mr. Agee, it wasn't loaned to Mr. Sheridan; it was loaned to Mr. Agee and then this note, Mr. Sheridan put that note in afterwards; I never seen it. The memorandum check was in the pass book, but before the memorandum check was drawn I didn't tell him to loan my money to Mr. Agee. I told him he could loan the money and he loaned it to

(Testimony of C. E. Marks.)

Mr. Agee, that is all I could tell you about it. And when Mr. Agee must have paid the note and he stuck in one of his own. That is about the way I see into that. There was another note loaned sometime ago, a \$5,000 note, I don't know exactly how long ago. It was loaned in the bank there, the First National Bank. Mr. Sheridan was the borrower. I suppose he drew his notes, I could not tell you. That \$5,000 item has been paid. As near as I can remember I was just about going to the old country before this loan was made and I asked Sheridan if he could make the loan of this money and he said he could and I believe he gave me his note for—I don't know—it is for a year's time, anyway. He gave me his note about a year and a half before these other papers. I was just about leaving for the old country and I came into Mr. Sheridan's bank and he said to me "The Bank Examiner said he wanted to see you." "All right" I said "I go in and see him." And he introduced me to the Bank Examiner, Goodheart. Before that time I had never seen that note for \$5,000.

The note having been paid and being in the possession of the defendant, it was then delivered by the defendant to the Government; it was admitted that the note was entirely in the handwriting of the defendant with the exception of the printed matter; the Government offered and it was received in evidence and marked as Government's Exhibit No. 36.

Witness continuing: I talked with Mr. Sheridan about making that \$5,000 loan about two weeks before

(Testimony of C. E. Marks.)

the National Bank Examiner was there; I had told Mr. Sheridan that he could make a loan of the money; I came into the bank and the Bank Examiner was there, and I went in and saw the Bank Examiner, and signed a release at that time. The release was a release to the Bank for \$5,000 and I signed it.

CROSS EXAMINATION BY MR. FULTON.

Witness continuing: I talked with Mr. Sheridan about loaning this \$5,000 two weeks before I saw the Bank Examiner. I saw the Bank Examiner some time in June. It was on a Saturday. Afterwards I received a letter from him. It was to the same effect as defendant's exhibit No. 3, now exhibited to me. After I had signed the release I received another from the Bank Examiner. This letter I received from him had nothing to do with the \$5,000; I was in the old country when it came. It came to my residence while I was in Europe and I didn't see it until my return and I didn't sign it. The \$5,000 had probably been deposited in the bank a couple of weeks before I had my talk with Mr. Sheridan. I had had a talk with Mr. Sheridan before I put the money in the bank about loaning it and I told him the money could be loaned out and he said it would be loaned. All the loans I ever understood he made the bank guaranteed these loans. He had authority to take it and loan it and I understood that the loans would be guaranteed. I told him the time I loaned the money that I thought the bank was guaranteeing it. Mr.

(Testimony of C. E. Marks.)

Sheridan absolutely guaranteed these loans. Sheridan himself said that it did. He said it himself. And outside of the bank he was worth a quarter of a million dollars. This \$5000 was repaid to me all right and there was not anything in writing about that. There was absolutely nothing wrong about that \$5000 transaction and I don't claim there was. This memorandum check of date June 27, 1909, I got that at the time the bank book was written up and returned to me. I probably had the book written up every two or three months or perhaps a shorter time. So I would suppose that this memorandum check reached me within two or three months after it was put in the bank. When I got it I understood what it meant; I understood that Mr. Sheridan had taken \$2000 out of my account; I didn't pay any attention to it. The only misunderstanding is about the \$500 memorandum check, that is loaned to Mr. Agee, and when it came to pay Mr. Sheridan stuck in his own note for the money—for the \$500. That is the only one there is any misunderstanding about between me and Mr. Sheridan. I did not have any conversation with Mr. Goodheart in the bank in the presence of Miss Albright in which I said that I had received his letter. I didn't say anything of the kind.

(Testimony of Harry P. Marks.)

HARRY P. MARKS,

A witness called on behalf of the Government testify as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live at Roseburg, Oregon. I am a farmer and am 30 years old. I have lived there for four years. I am a son of C. E. Marks; I know the defendant Thomas R. Sheridan in a way; I was never acquainted with him and saw him for the first time about three years ago. I had no conversation with him relative to the loaning of my money.

MR. FULTON: It is understood we have an objection to this.

COURT: Yes.

The Government offered and there was received in evidence a memorandum check of date August 10, 1909, for \$745 against the account of Harry P. Marks, at the First National Bank of Roseburg, Oregon, the defendant admitting that with the exception of the printed portion it is entirely in the handwriting of the defendant. It was marked Government's Exhibit No. 37.

Witness continuing: In January, 1912, after the consolidation of the two banks I saw this check for the first time. Started in doing business with the First National Bank in 1907 or 1908.

The Government offered and there was received in evidence a promissory note, of date August 10, 1909,

(Testimony of Harry P. Marks.)

the same date as the memorandum check and for the same amount of money, the defendant admitting that it is entirely in the handwriting of the defendant. It was marked as Government's Exhibit No. 38.

Witness continuing: I never did see that note for \$745 until away along the winter after the bank was closed. I did not know that Mr. Kelsay owed me \$745, until I received the note and memorandum check from my father. I don't remember when it was. I had never spoken to Mr. Sheridan about it at all.

MR. FULTON: It seems to me, Your Honor, that this subject—this being entirely an outside matter and not one of those alleged in the indictment, which is two years subsequent, that this being entirely an outside matter and two years before, it is not admissible under the rule under any circumstances. It is not an incident that can be proven as similar, because it must have been about the time of some of the matters alleged in the indictment to be admissible on that ground, and this is too long prior, too far away to be admissible in this case, I think.

COURT: It is rather remote, the rule is that the transactions must have occurred at or about the same time. I think probably it goes to its weight rather than to its competency. I will admit it; I admitted others of the same nature and allow you an exception.

(The Government offered and there was received in evidence a memorandum check against the account of H. P. Marks in the sum of \$540.32, at the First

((Testimony of Harry P. Marks.)

National Bank of Roseburg, Oregon, of date January 25, 1910, the defendant admitting that it is entirely in the handwriting of the defendant. Also the Kelsay note of the same date, in favor of H. P. Marks, the defendant admitting that it is in the handwriting of and signed by the defendant.

The defendant objected and excepted to the introduction of the note and memorandum check. The memorandum check was marked Government's Exhibit No. 39 and the note was marked Government's Exhibit No. 40.)

Witness continuing: In regard to the Government Exhibit No. 39 and Government Exhibit No. 40, being the note and memorandum check, each dated January 25, 1910, I have now examined them and state that the first time I ever saw them was in the year 1913. I got them at that time from my father.

The defendant admitted that on August 10, 1909, by means of this memorandum check, \$745 was taken from the account of H. P. Marks, and on January 25, 1910, by means of Government Exhibit No. 39, \$540.32 was taken from the account of the depositor and placed to the credit of A. M. Kelsay.

Witness continuing: I received a letter from the Bank Examiner and signed and returned it. I do not know Mr. Kelsay. I never met him; I never told Mr. Sheridan to loan this money.

(Testimony of Harry P. Marks.)

CROSS EXAMINATION BY MR. FULTON.

My father delivered to me these notes and memorandum checks and I understood that he got them from Mr. Sanford; I had been away from home for three or four months. I had a deposit book but I do not know where it went. I sent in some deposits to the bank with different fellows and in different ways, if I happened to be there. Sometimes I mailed them in to the bank. My father did not attend to any of them for me. I was in business for myself at that time and was not a member of the firm of Marks Bros. I have been since, however. The firm of Marks Bros. at that time was composed of J. E. and E. C. Marks, both of whom are brothers of mine, and I entered the firm in 1913. I knew nothing about these checks or the appropriation of this money until some time in 1913. I did receive a letter in June, 1911, from the Bank Examiner, in which he wanted me to sign a release, or suggested a state of facts that I should, but I didn't realize about it at that time. I did not sign the release, although the letter from the Bank Examiner gave me the amounts that had been loaned out of my account, but I paid no attention to it.

(Testimony of David Hull and W. J. Carlon.)

DAVID HULL,

Being recalled for Cross Examination testified as follows:

CROSS EXAMINATION BY MR. FULTON.

I am acquainted with Mr. George A. Crane. I had a conversation with him during the summer or fall of 1913, at Smith's Livery Stable. I told Mr. Sheridan to use \$500, certainly. I don't remember what I told Mr. Crane that day at all.

W. J. CARLON,

Being recalled for further cross examination, testified as follows:

CROSS EXAMINATION BY MR. FULTON.

I am slightly acquainted with August Schloemann. I saw him on the street in Roseburg shortly after Mr. Goodheart was in Roseburg; he did not remain at my home over night. I have no home but sleep in an old granary. I do not remember of ever having slept with him; he might have been at that place, but I do not recollect it now. I talked with him, however, about Mr. Sheridan and the First National Bank; the talk was on the street; I told him at that time that I had \$1500 in the bank. I told him that Sheridan had my money, that he got it without my knowledge and that I accepted

(Testimony of C. J. Marks.)

notes for it. That conversation, as well as I remember, was on Cass Street; I did not tell him that I let Sheridan have the money. I know Charles Holland of Myrtle Creek. I did not have a conversation with Holland in the spring of 1911 in the Monogram Cigar Store in Roseburg, in which I asked Mr. Sheridan, in the presence of Mr. Holland, if he had loaned my money yet, or if he was going to take it himself. I had no such conversation with Mr. Sheridan in the presence of anybody.

C. J. MARKS,

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live at Gardiner, am 35 years old, and have lived there all of my life. I am the manager of the salmon cannery at Gardiner and have known T. R. Sheridan for four years. I have been a depositor in the First National Bank of Roseburg since 1908. I never had any conversation with Mr. Sheridan relative to loaning my money; I never wrote him any letter or communicated with him in any way concerning loaning my money. In regard to the memorandum check, of date January 25, 1910, and the promissory note, dated January 25, 1910, each in the amount of \$500, I first saw those two documents after my father gave them to me. This was about a year and a half ago, something like that, and

(Testimony of C. J. Marks.)

was after the consolidation of the First National Bank and the Douglas National, a long time afterwards.

(The Government offered and there was received in evidence the memorandum check and the note, the defendant admitting that with the exception of the printed matter they are entirely in the handwriting of the defendant. The memorandum check was marked Government's Exhibit No. 41 and the note was marked Government's Exhibit No. 42.)

It was admitted that on January 25, 1910, by means of the memorandum check, \$500 was taken from the account of C. J. Marks.

Witness continuing:

No part of this money has ever been repaid. In regard to the memorandum check of date December 6, 1911, for \$800, and a note of the same date, for the same amount, I have examined them and state that I saw them for the first time when father gave them to me. This was after the consolidation of the two banks.

It was admitted that the note and memorandum check are entirely in the handwriting of the defendant. The Government offered them in evidence and they were received and marked as follows: The memorandum check was marked as Government's Exhibit No. 43, the promissory note was marked as Government's Exhibit No. 44.

It was admitted that by this transaction the money was taken from the account of the depositor.

(Testimony of C. J. Marks.)

Witness continuing: I received two releases. Mr. Sheridan and I were doing a lot of business and I thought that I would favor him by signing one and one I would keep, so I would not go entirely broke any way. One of them I signed and one I kept. I signed the release for the \$800, which certified that \$800 had been loaned to T. R. Sheridan, had been withdrawn by Sheridan from my balance and duly authorized by me. But I had not authorized him to do it. The one I did not sign and the release I kept was for \$500. I had a conversation with Mr. Sheridan in the bank about July 7th or 8th, somewhere along there, the year 1911, just after the Bank Examiner had been there. This was after I had signed the release that had been sent to me from the Bank Examiner. I just simply asked Mr. Sheridan where my money was and he said "It is all out working." That is the complete word for word, I think, and I never had any other talk with him about it.

CROSS EXAMINATION BY MR. FULTON.

I received two letters of this character from the Bank Examiner. I had a bank book and had interest credited up in the bank book. In January, 1912, I think it was, we straightened the interest up, but I had received interest before that. I could not tell you how early it was that I received interest. My bank book did not show that this money had been taken out of my account. I would send my bank book to my father to have it marked up and that would show that I was getting interest on

(Testimony of Edward C. Marks.)

some loan, but I supposed I was getting it from the bank and that the bank was paying interest. My father was attending to the matters for me. When I signed this release, and I understand exactly what it says, I knew that it wasn't true, and I knew it at the time I signed it. I understand every word of it. I imagined Mr. Sheridan might be a little bit crowded and I thought I would favor him by that. I did not think the Bank Examiner would care, just so long as I released the bank. I know it was stated in the release that I had authorized Mr. Sheridan to take the money, but I signed something that was not true; I thought Mr. Sheridan was all right.

(The release was offered in evidence by the defendant and marked as defendant's exhibit No. 8.)

EDWARD C. MARKS,

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live at Roseburg; have lived there for 16 years and am a son of C. J. Marks. I started an account as a depositor with the First National Bank of Roseburg in the year 1905 or 1906. I had a small deposit of \$100 or so and continued as a depositor until the First National Bank consolidated with the Douglas National Bank. I never did have any talk or conversation with the de-

(Testimony of Edward C. Marks.)

fendant, relative to loaning my money, and never wrote to him or communicated with him in any way about it.

The Government offered in evidence a memorandum check, of date June 29, 1907, for \$300, and a note payable to E. C. Marks, signed B. C. Agee, by "T," it being stated by the Government that these documents did not refer to any count in the indictment. It was admitted that both documents are entirely in the handwriting of the defendant and that by the cashing of the memorandum check for \$300 on June 29, 1907, \$300 of the depositor's money was taken from his account and placed to the credit of the account of B. C. Agee. The memorandum check was marked Government's Exhibit 44½ and the promissory note of the same date was marked as Government's Exhibit No. 45.

Witness continuing: No part of the note has ever been paid. On the back of the note there are two notations—one is "Interest paid to June 29, 1908, \$21" and "Interest, \$21 paid to June 29, 1909." I think I got that interest; I did not know that my money had been loaned to Mr. Agee until I got the note some time after the bank was closed. But I did know that interest was being paid upon it. I think it appeared in the bank book, but I thought the bank was paying interest, because it was put in the book.

Witness continuing: The memorandum check of date August 10, 1909, for \$300 marked "A. M. Kelsay," and a promissory note for \$300 of the same date, due on demand, signed "A. M. Kelsay, by T." I have ex-

(Testimony of Edward C. Marks.)

amined these; I first saw this note when I got it out of the bank a little over a year and a half after the bank was taken over.

The Government offered and there was received in evidence the memorandum check and the note, the defendant admitting that they were in the handwriting of the defendant. The memorandum check was marked Government's Exhibit 46, and the promissory note was marked Government's Exhibit 47.

It was admitted that on August 10, 1909, by the cashing of this memorandum check \$300 was taken from the account of the depositor and placed to the credit of the account of A. M. Kelsay.

Witness continuing: The memorandum check of date January 29, 1910, marked "Loaned to Agee," \$937.52, and a promissory note of the same date for the same amount signed T. R. Sheridan; I have examined these and they first came into my possession when I got the other note. I think, however, that the memorandum checks were left in the book when the book was balanced each time. I didn't really know what the memorandum checks were and I didn't know that I was loaning the money to Agee and to Sheridan.

It was admitted that the memorandum check and the note are both entirely in the handwriting of the defendant, with the exception of the printed matter. The Government offered and there was received in evidence the memorandum check and it was marked as Government's Exhibit 48. The note of the same date was re-

(Testimony of Edward C. Marks.)

ceived in evidence and marked as Government's Exhibit 49. It was admitted that by the cashing of this memorandum check on January 29, 1910, \$937.52 of the depositor's money was taken and placed to the credit of B. C. Agee.

Witness continuing: I was a member of the firm of Marks Brothers, and we were engaged in the farming business about four miles from Roseburg.

It was admitted that the memorandum check of date December 4, 1910, and the promissory note of the same date both in the amount of \$3000 are entirely in the handwriting of the defendant and the Government offered, and there was received in evidence the memorandum check and the note. The memorandum check was marked Government's Exhibit 50 and the note was marked Government's Exhibit 51.

Witness continuing: I received the note at the same time I received the others. In regard to the release of date June 20, 1911, containing a release for \$300 loaned to Agee, \$300 loaned to Kelsay, and \$937.52 loaned to Sheridan, I have examined the release and state that I signed it. I got this letter and took it to the bank when I went into the Douglas National Bank. After I received this letter, some few days afterwards, I think, and I asked Mr. Sheridan about the matter. He said "it is all right, sign it." He said, "Those fellows are trying to get me in some little trouble;" and he said "If you will sign it, it will be a favor of you;" and I never paid much attention to it, and I signed it, and

(Testimony of Edward C. Marks.)

if I am not mistaken, I left the letter at the bank and he mailed it for me. The other release for \$3000 signed by Marks Brothers I did not sign, but I believe it was signed by my brother J. E. Marks who is now at Roseburg.

It was admitted that by Government's Exhibit No. 50, the memorandum check \$3000 was on December 13, 1910, taken from the account of Marks Brothers.

CROSS EXAMINATION BY MR. FULTON.

Witness continuing: I received these memorandum checks as my bank book would be balanced. I could not tell you the exact dates. It would be every three or four months; this was back in 1910. In regard to the loan to Agee, I did not know what that meant. In 1910 I received a memorandum check that told me that Sheridan had loaned to Agee the sum of \$937.52 out of my deposit account and had charged it to me; I could read that, and I expect I did, but I did not understand what it was meant; I did not understand the meaning of it; I did not understand what it meant; I never gave it much thought; I never got any interest; I never paid any attention to it. When the interest began to come I thought it was from the bank and I expected that the bank had loaned it to Agee and charged it to me; but the bank had been paying me no interest before this; I supposed the bank was paying interest on these loans and that the bank had loaned the money to Agee; I did not know where the interest was coming from. In

(Testimony of Edward C. Marks.)

regard to the loan to Sheridan on December 3, 1910, of \$3000 charged to the account of Marks Brothers, I was a member of the firm at that time and got that deposit slip in the bank book; when I got this letter from the bank examiner I went in to see Mr. Sheridan; it was a few days after I received it. I found him in the Douglas National Bank; I gave it to Mr. Sheridan; there was nobody else present in the room; the conversation was entirely between myself and Mr. Sheridan; I asked him about the letter and what it meant; I could read and I understood the letter; I never did give him authority, but I signed it with his recommendation to sign it; he said that somebody was trying to make him trouble, and I supposed it was Mr. Goodheart. That is what he told me. He said that they were trying to get him into trouble. Mr. Sheridan had not been to see me about it and had not written to me; I went out of my own accord to see Mr. Sheridan. It probably was agreed between my brother and myself that he should sign the other release; I told him to take the letter to Mr. Sheridan; I suppose we talked it over, but we did not sign it there or agree to sign it, but I told him to take it and give it to Mr. Sheridan; I don't know when it was signed; I did not know that my brother had signed it; I don't believe he ever told me that he did sign it, but I suppose he attended to the business; he might have told me but I don't think he positive did tell me; I told him to take it and see Mr. Sheridan and I suppose it was signed; he never told me he signed or not, but I

(Testimony of E. E. Haines.)

expect he did; I never asked him whether he signed it or not.

The defendant offered in evidence the release of E. C. Marks and it was received and marked as defendant's exhibit 9.

The defendant offered in evidence the release of Marks Brothers and it was received and marked as defendant's exhibit 10.

E. E. HAINES,

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live at Elkton, Oregon, and am a mail carrier; I have lived there for 52 years and have known Mr. Sheridan as long as I can remember; I have been a depositor of the First National Bank of Roseburg for 16 or 18 years.

The Government offered and there was received in evidence the memorandum check of date April 6, 1908, for \$2000, and a promissory note of the same amount and same date, the note being signed by T. R. Sheridan; the defendant admitting that the note and the memorandum check are in the handwriting of the defendant, the Government stating that these documents were offered for the purpose of proving intent. The memo-

(Testimony of E. E. Haines.)

random check was marked as Government's Exhibit No. 52, and the note was marked as Government's Exhibit 53.

It was admitted that by means of this memorandum check on the day it bears date, April 6, 1908, \$2000 of the depositor's money was taken from the account of the depositor E. E. Haines and is represented by the \$2000 note of the same date.

Witness continuing: This is the first time I ever saw the note in my life; I never seen it before; the memorandum check I suppose is one I got; I say this is the first time I ever saw this note; the memorandum check I suppose is the one that was sent to me two or three months or more after this date; I don't remember how long; it was sent to me after the date of the memorandum; the note has never been paid; I never had any conversation with Mr. Sheridan relative to the loaning of that money; I did have one conversation with him; I do not remember the date; there was a little talk about the bank loaning some money that was there and I think, if I remember right, it was about fifteen or twenty days after this date of this memorandum check; I had not got the memorandum check yet and knew nothing about it; I was talking of loaning one of my wife's uncles a little money on a piece of land that I did not know. I kind of thought that he wanted—anyway, I went into the bank and asked him (Mr. Sheridan) about the land—I knew he would know about it, and he said the land he guessed was worth what he wanted to borrow on it, and not any more, and went on to say if he did not pay

(Testimony of E. E. Haines.)

interest for a year or two I would be out of the interest and I kind of did not want to let him have the money, because I did not think—well, anyway he said it might be worth it. He said the land was probably worth about what the man wanted and not any more, and he said “you are keeping most too much money here, and you ought to have it earning something.” And he said, “the bank will take your money;” and he said, “they could loan it—oftentimes men come in here that are good men, and want to borrow for a year or more;” and he said “it is short loans the bank wants and the bank will loan your money for 8% and they will give you seven, keep one per cent for their trouble.” But I did not tell him to loan it and that was after this memorandum check was dated; that was just about all the conversation there was about it; I never talked with him afterwards about it; the first I knew my money was loaned was when I got this memorandum check, and I think I got a statement from the bank either in July or August, I can’t remember just when that did come; there was a statement came with it but I cannot find the statement. It might have been about April 6, 1908, but the bank book will show it. The memorandum check was in the statement that was returned to me; I did not understand one thing in the world about it; I just supposed the bank had loaned money as they said they would, and I did not understand it at all. Did not know no more what it meant than nothing in the world; I never did know until now that I had Mr. Sheridan’s personal note for the amount; I received a letter from the Bank Examiner

(Testimony of E. E. Haines.)

of date June 20, 1911; after I got this letter I did not know no more that the money was loaned to Mr. Sheridan than nothing in the world; I did not sign the release.

CROSS EXAMINATION BY MR. FULTON.

Witness continuing: I never did know that my money was loaned to T. R. Sheridan until I received a letter from Mr. Goodheart; I did not know it was loaned to Sheridan at all; I received this memorandum check some time in 1908 in my bank book; it had on it these words—"Loaned T. R. S. Charge E. E. Haines." I did not know. He was president of the bank and I did not know but what that was some way they had of keeping account of them; I say I did not know—I am honest about it; I knew what loaned meant but there wasn't a word said about him borrowing it and did not think about it. Sheridan had said that the bank would take it, but I never give him authority to loan it at all; I had made no arrangement to loan it. I had not given any right to loan it and I did not think much more about it; I tried to loan it myself and I did loan some and checked on the bank; when I received this memorandum check I supposed that T. R. S. meant T. R. Sheridan; I did not understand at that time that it meant that T. R. Sheridan had loaned \$3000; I thought when I received the check that the bank had loaned the money; I had an idea it had been loaned but not to Sheridan; I did not make any complaint during

(Testimony of John E. Marks.)

the year 1908, 1909 or 1910, because I thought it was just as they said it would be, and it is a fact when I received the memorandum check I supposed that the bank had loaned it as it said it would.

The defendant offered and there was received in evidence a letter under date of November 16, 1911, written by H. P. Marks to T. R. Sheridan; the letter was marked Defendant's Exhibit 11.

JOHN E. MARKS,

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live at Roseburg and have lived there fifteen years; I am 28 years of age and a member of the firm of Marks Brothers. During 1911, the firm was composed of J. E. Marks and E. C. Marks. I have banked with the First National Bank of Roseburg for over eight years; the account of Marks Brothers was opened first and afterwards I had an account there in my own name; I knew Mr. Sheridan but I never had any talk or conversation with him about the loaning of my money for me, and never wrote to him or gave him any authority to loan my money; I did not know at the time that any of my money was loaned and I first found it out when the bank book came back.

BY MR. REAMES: This is offered simply for the purpose of showing intent.

(Testimony of John E. Marks.)

Witness continuing: I first came to discover that I did not have any money in the bank when I traded an automobile and gave the automobile company a thousand dollars to boot on the car, and I went to get the money and they said I did not have any,—it was loaned out. I never did give Mr. Sheridan any authority to loan any money from the Marks Brothers account. In regard to the check of date December 13, 1910, being Government's Exhibit No. 50, for \$3000, I have now examined it and say that I never authorized the execution of that check. In regard to Government's Exhibit No. 51, a promissory note of date December 3, 1910, for \$3000, due one year after date to Marks Brothers, and signed by T. R. Sheridan, I never did see that note until a few months after its execution. I may have seen it when the trouble first occurred at Roseburg, but not that I know of. My brother might have done the business,—I had nothing to do with it. In regard to the photographic copy of the release of date June 20, 1911, signed by Marks Brothers, I have examined this and I signed that release. At the time this release came to us we did not know what it was,—we did not know what it meant, what was the idea of it, and my brother and I had a short conversation, and after the talk I had with my brother I took the release to Mr. Sheridan and found him in the Douglas National Bank; I handed the release to Mr. Sheridan and asked him what about this, and he said "sign it, it is all right;" and I signed it and put it in the envelope and Mr. Sheridan says "I will mail it for you."

(Testimony of John E. Marks.)

CROSS EXAMINATION BY MR. FULTON.

Witness continuing: I did not know the money was loaned until I saw it marked in the book "loaned." The book said \$3000. I could not just tell you when it was wrote up; I don't know that I ever seen it. My brother kept the bank book; I did not know what year it was loaned. I have here the Marks Brothers' bank book (produced by the United States attorney). This is the bank book and this item here under date of December 13, "loaned \$3000" is the one to which I refer. The book apparently was balanced in January, 1911, and shows that it was written up at that time. My brother always took the book from the bank; I would never see the bank book, he always kept the bank book and he would go and get it; when my brother got the bank book he said \$3000 had been taken out and I did not inquire how it had been taken out; I never did see the memorandum check, Government's Exhibit No. 50, for my brother attended to that part of the affair; I did not know to whom the money had been loaned and made no inquiry. It did not occur to me to be queer that I having given no authority to make the loan that I should make no inquiry where the loan had been made. This Defendant's Exhibit No. 10 I received through the mail and conferred very little with my brother about it. We both read it over. I would not deliberately sign anything that was untrue but I did not know what I was signing. If I signed anything that was untrue it would be because I did not know what I was signing. I didn't

(Testimony of Mrs. W. T. DeWar.)

know what this meant when I signed it. I can read, although I am not very well educated. My brother keeps the accounts and I did not look after them or ever examine them. We talked over the release together and I read it before I talked to my brother. I could not tell you who opened it first when we received it through the mail. We did not go over the language in the release. Now as you read me the release I see that I must have understood it, but I did not really understand it and that is the reason I took it to Mr. Sheridan and asked his judgment; I did not understand it. The loan was not authorized by me. I did not authorize him to loan; the language of the release says that it was authorized but I never did authorize him. I took it to Mr. Sheridan and asked him. Mr. Sheridan said it was all right and for me to sign it, but I did not authorize him; if I had understood what it meant and signed it then of course I would have thought that it was true; I thought the bank was behind everything the man was doing; no part of the \$3000 has ever been paid by the defendant; the interest has been paid on it once.

MRS. W. T. DeWAR,

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live at Gardner and was a depositor in the First National Bank since the year 1906 or 1907. I never did

(Testimony of Mrs. W. T. DeWar.)

have any talk with Mr. Sheridan about loaning my money for me.

BY MR. REAMES: This is offered simply for the purpose of proving an intent to defraud.

Witness continuing: We talked a few words in the bank; it was shortly before the money was take out and Mr. Sheridan and I were talking there in the bank and the money was there of course; and I was not getting any interest from it and we were talking there; I don't remember just how it came up, but anyway in our conversation he advised me to put the money on interest; he said they were having calls every day and he said that they were having calls every day at the bank there for money and that it would be just as good as gold, and by all means he said, put it on interest and get some good out of it; but in our conversation I told him, I said that I must have,—must be sure that nothing but good security was taken; I said "it must be a good safe loan and I must have but good security. I must have a conversation with my husband before I do anything, as I would not put out a dollar without his consent." And of course I was away from home at the time and he assured me at the time if I allowed them to put the money out there would be nothing but good security taken.

The Government offered and there was received in evidence the promissory note of A. M. Kelsay signed by T. R. S. of date November 26, 1909, the defendant admitting that the note with the exception of the printed

(Testimony of Mrs. W. T. DeWar.)

portion thereof is entirely in the handwriting of the defendant. It was marked Government's Exhibit 54.

Witness continuing: The first time I ever saw this note, Government's Exhibit 54, was in the spring of 1912, or 1913. My husband happened to be in Roseburg and I got it from him. In regard to the letter of date December 21, 1909, I received it on or about the date of the letter.

It was admitted that the letter is in the handwriting of and signed by the defendant and the Government offered it in evidence and it was received and marked as Government's Exhibit No. 55.

Witness continuing: I did not receive any memorandum check from the bank on account of this transaction and had no notice whatever from the bank. I never had any other conversation with Mr. Sheridan other than what I have told; no part of the money has ever been repaid.

CROSS EXAMINATION BY MR. FULTON.

Witness continuing: The first time I ever talked with Mr. Sheridan about loaning my money was shortly before the note is dated, or just about the time; just shortly before I received the letter from Mr. Sheridan,—I think perhaps as much as a month before, or half a month before. I had a talk with Mr. Sheridan before the loan was made; I did not know that Mr. Sheridan had loaned the money; he did not state that he had loaned the money, he said the money would simply draw

(Testimony of Mrs. W. T. De War.)

interest; he said the party had been selected, but I had no notice the money was drawed out. I did not go back again and I received interest for one year in 1910; I had nothing to tell me the money was loaned; he said the money would begin drawing interest and that the party was not there to get the money. I understood that Mr. Sheridan was taking this money for the bank. I did not know my money was loaned. I supposed the bank would pay the interest; I never had any notice that the man had taken the money; I had not checked the money out of the bank and I supposed when Mr. Sheridan or the bank had found a good loan with good security they would request me to take the money out, but as I had not taken the money out I considered the bank was good for the money. He did not tell me in this letter that the loan was practically made and I did not so understand it; I got the note either in 1912 or 1913, I would not be positive just which; I testified in my case against the First National Bank on this note as a witness. I did not try to sell this note to several parties. I did not consider the note was worth anything. I would not have wanted to have bought such a note, and I did not offer it for sale. I know Mr. George Crane. I did not have any conversation with him in Roseburg in 1911 referring to this note in which I said to him that I would like to sell the note. I know Mr. Mr. W. H. Fisher of the First Trust Bank of Roseburg. I knew him when I met him. I did not shortly after I received this note go into his place of business at Roseburg and offer to sell it. I never had any con-

(Testimony of Mrs. Tim D. Barry.)

versation with Mr. Fisher whatever except just to speak to him in passing.

MRS. TIM D. BARRY,

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live at Dothan in Douglas County, Oregon, about fifty miles from Roseburg; I know Mr. Thomas R. Sheridan and have known him for many years; I began doing business with the First National Bank of Roseburg in July, 1908; I had a talk with Mr. Sheridan about loaning my money for me; it was about July 14th I went into the bank to see Mr. Sheridan and I deposited some money that day, and I spoke to Mr. Sheridan about loaning my money and he was to give me seven per cent interest; I think there was something over \$2000; I asked him to lend it and I suppose he loaned it, I don't know.

BY MR. REAMES: This is offered for the purpose of proving an intent to defraud.

The Government offered and there was received in evidence a memorandum check of date June 28, 1909, against the account of Mrs. Tim D. Barry at the First National Bank of Roseburg, Oregon, in the sum of one thousand dollars; the defendant admitting that the same

(Testimony of Mrs. Tim D. Barry.)

is in the handwriting of the defendant. It was marked Government's Exhibit No. 56.

The Government offered and there was received in evidence a memorandum check of date August 29, 1908, the defendant admitting that it was in the handwriting of the defendant and the same was received and marked as Government's Exhibit 57.

The Government offered and there was received in evidence a promissory note of date December 15, 1909, the defendant admitting that the document was in the handwriting of the defendant, and signed by him. It was marked Government's Exhibit 58.

Witness continuing: In regard to Government's Exhibit No. 58 being a promissory note of date December 15, 1909, signed T. R. Sheridan, due one year after date, in my favor, I have now examined it, and I never saw the note before. In regard to the two memorandum checks, Government's Exhibit No. 56, and Government's Exhibit No. 57, the first for one thousand dollars, and the other for two thousand dollars, these were sent to me through the bank in my bank book. I think that is the way they came; I would often speak to Mr. Sheridan about the loans but I just can't remember the conversation; I always looked to Mr. Sheridan for my money,—I looked to him as the president; I always looked to him for the money.

It was admitted that the money represented by these two memorandum checks, Government's Exhibit No. 56, and Government's Exhibit No. 57, that by the

(Testimony of Mrs. Tim D. Barry.)

means of these that amount of money came out of her account on that date.

It was admitted that a memorandum check of date March 18, 1910 for \$500 against the account of Mrs. Barry is entirely in the handwriting of the defendant and the same was received and marked as Government's Exhibit No. 59.

It was admitted that on March 18, 1910, five hundred dollars came from her account and went to the account of A. M. Kelsay.

It was admitted that the promissory note of date March 18, 1910, for five hundred dollars is entirely in the handwriting of the defendant, and that the defendant signed thereto the name of A. M. Kelsay, by T.

The Government offered the note in evidence and it was received and marked as Government's Exhibit No. 60.

It was admitted that a memorandum check signed "Mrs. T. D. Barry" signed "Charge Mrs. T. D. Barry," "Loaned," is entirely in the handwriting of the defendant and the same was offered by the Government and received in evidence and marked as Government's Exhibit No. 61.

It was admitted that the promissory note of T. R. Sheridan of date November 28, 1910, was entirely in the handwriting of the defendant, and the same was offered by the Government and received in evidence and marked as Government's Exhibit No. 62.

Witness continuing: I saw the memorandum checks

(Testimony of J. D. Cooley.)

as the bank book was returned to me, but I don't know as I ever saw the notes; I have now examined the note, Government's Exhibit No. 58, and I don't hardly think I ever saw that; I don't think so. No part of these notes have ever been paid; Mr. Sheridan never did tell me to whom he had loaned the money. In regard to the release from the Bank Examiner of date June 20, 1911, I received this at my home, so I brought the letter down to Mr. Sheridan for I knew I had the five thousand dollars in the bank, and in that way I brought the letter to Mr. Sheridan and asked him about it, and he said it was a matter of form and I signed it; I knew there was five thousand dollars that was there in the bank.

CROSS EXAMINATION BY MR. FULTON.

Witness continuing: I was drawing interest from the money and assumed that Mr. Sheridan had loaned it according to the agreement; he had never sent any of the notes to me when he had made other loans for me; I suppose a person is careless in doing those things, but I think that is really the way I did.

J. D. COOLEY,

A witness called on behalf of the Government testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live at Agnes in Curry County, Oregon, and have lived there for fifteen years. I made a trip to Alaska

(Testimony of J. D. Cooley.)

in the fall of 1907 and returned in the fall of 1909. I have been a depositor of the First National Bank of Roseburg since 1905. I think I first wrote to Mr. Sheridan about loaning my money; I wrote him from Alaska in June, 1909; I did not have any talk with Mr. Sheridan about loaning my money before I went to Alaska.

The Government offered and there was received in evidence a letter dated at Fort Liscum, Alaska, June 4, 1909, addressed to Mr. T. R. Sheridan, and signed J. D. Cooley, and the letter was received and marked as Government's Exhibit No. 63.

It was admitted that a promissory note of date January 2, 1909, and one of date January 2, 1908, are both in the handwriting of Mr. Sheridan. The Government offered both of these in evidence and they were received and marked. The note of January 2, 1908, was marked Government's Exhibit No. 64, and the note of January 2, 1909, was marked Government's Exhibit No. 65.

Witness continuing: I first saw these notes in the office of the United States Attorney, and prior to that time I had never seen them. I received a statement from the National Bank Examiner which is the letter of date June 20, 1911. I signed the release at the bottom. I read it before I signed it. I presume I read the entire letter, although there is a portion of it that I don't remember, but I presume I did. I think I did. I was at my home when I signed it and I returned it to the

(Testimony of J. D. Cooley.)

National Bank Examiner. I gave him no authority at all except the authority I gave him by letter.

CROSS EXAMINATION BY MR. FULTON.

Witness continuing: I gave Mr. Sheridan permission to use the money so if he did use it he did it with my authority.

REDIRECT EXAMINATION BY MR. REAMES.

Witness continuing: The amount was not stipulated that I gave him authority to draw out. I never gave him any direct authority, although it might have been implied. I had a talk with Mr. Sheridan about this matter about the money in Roseburg and I came back and I told him I was thinking of going into some business here in Portland,—how was it going to be about my drawing? He told me to go ahead and draw my checks just as I had always done and they would be honored; there was nothing said as to whether the money was there or not, or who had the money.

The defendant offered in evidence the bank book identified as the bank book of Marks Brothers. It was received and marked as Defendant's Exhibit No. 12.

(Testimony of George P. McNamee.)

GEORGE P. McNAMEE

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live in Portland, and have been bridge foreman on a bridge gang for the O. R. & N. Railroad Company. I formerly lived in Douglas County and lived there in 1906, but I was there about fourteen or fifteen years and was a depositor of the First National Bank of Roseburg in January, 1895, but that account was all checked out; I checked my account out there a couple of times; I had a deposit in the bank in 1908 or 1909; I never talked with Mr. Sheridan about loaning my money but we had some correspondence about it.

The Government offered and there was received in evidence a letter of date July 23, 1909, written to the witness by the defendant, the defendant admitting that the letter is in the handwriting of the defendant. It was received and marked as Government's Exhibit No. 66.

Witness continuing: The letter of date February 3, 1911, from Biggs, Oregon, I wrote that letter to Mr. Sheridan and sent it to him.

The Government offered and there was received in evidence the letter identified by the witness, of date February 3, 1911, and it was received and marked as Government's Exhibit No. 67.

(Testimony of George P. McNamee.)

The Government offered and there was received in evidence a letter of date February 8, 1911, admitted by the defendant to be in his handwriting, and it was received and marked as Government's Exhibit No. 68.

The Government offered and there was received in evidence a memorandum check of date February 9, 1911, for the sum of \$2956.60, and a promissory note, the defendant admitting that the memorandum check and the promissory note are entirely in the handwriting of the defendant. The memorandum check was marked Government's Exhibit No. 69, and the note 70.

Witness continuing: In regard to the promissory note, Government's Exhibit No. 70, the first time I ever saw it was when you showed it to me just now.

It was stipulated and conceded that the United States Attorney through his agents received these notes from the bank; that these notes were in a pigeon hole in the bank and that the Government officers took them from this pigeon hole; that they were enclosed in an envelope with the party's name on the envelope; that the pigeon hole would be lettered with the initial of the name of the depositor; for instance, Adams would be under "A," and Brown would be under "B," and the envelope containing his particular note would have his name on it.

Witness continuing: The memorandum check of date February 9, 1911, being Government's Exhibit No. 69, this is the first time, right now, that I ever saw it.

(Testimony of George P. McNamee.)

It was admitted that by means of this memorandum check of February 9, 1911, that \$2956.60 of the depositor's money was taken from the account of the depositor.

It was admitted that the letter of date June 18, 1912, is entirely in the handwriting of the defendant; it was offered by the Government and received in evidence and marked as Government's Exhibit No. 71.

Witness continuing: I received this letter from Mr. Sheridan; it was about a year ago I think it was, when I was summoned before the Grand Jury, that I first found out that I had Thomas R. Sheridan's note for my money; that was in February, 1914; I received a letter from Mr. Goodheart the Bank Examiner; I knowed my money had been withdrawn from the bank, but not prior to the time I got the letter from Mr. Goodheart; before I got that letter from Mr. Goodheart I did not know that my money had been loaned; no part of the money has ever been repaid.

CROSS EXAMINATION BY MR. FULTON.

Witness continuing: I got a letter from Mr. Goodheart which is the one you showed to me, and I signed the release at the bottom.

The defendant offered and there was received in evidence the letter of Mr. Goodheart with the attached release and the same was received and marked as Defendant's Exhibit No. 13.

(Testimony of E. P. Preble.)

Witness continuing: The letter I received from Mr. Goodheart had a statement of what had been loaned; the same amount was set out as represented by the notes; it stated that the amount has been withdrawn and to whom it had been loaned, and this certificate was down below and I signed it.

REDIRECT EXAMINATION BY MR. REAMES.

Witness continuing: I never had any conversation with Mr. Sheridan about loaning my money and all of the authority that had been given had been given by writing and in that one letter.

E. P. PREBLE,

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live at Roseburg and have lived there for 27 or 28 years; I am a farmer; I have known Mr. Sheridan for 27 years and was one of the depositors of the First National Bank of Roseburg. I had a talk with Mr. Sheridan about loaning money; he spoke to me one day about why I did not loan it. I told him I would like to use it; he told me he could loan it on short loans, that I could get it most any time. I told him that I would not do anything until I went home and talked with my

(Testimony of E. P. Preble.)

wife, and I would let him know when I came over again; probably a couple of weeks I came in again and he handed me a note, a promissory note.

BY MR. REAMES: This is offered for the purpose of proving intent.

The Government offered and there was received in evidence a memorandum check of date February 21, 1910, for \$3000. It was received and marked as Government's Exhibit No. 72.

The promissory note of date February 8, 1910, due three months after date, signed by John Servia and T. R. Sheridan, written in favor of E. P. and Emily Preble for \$3000, was admitted to be, with the exception of the printed matter, entirely in the handwriting of the defendant, and that the defendant wrote the name of John Servia as well as his own upon the note.

The Government offered the note in evidence and it was received and marked as Government's Exhibit No. 73.

Witness continuing: The note must have been drawn up about the time I had the talk with Mr. Sheridan; he gave me a note at that time; he said he had let the money out and he had O. K.'d it to make it good to me. I asked him one day who John Servia was, and he said he was a friend of his; that is about all that was said that day; I asked him again where he was and the last he heard of him was in Montreal, I believe. I never saw the man that I know of. The memorandum

(Testimony of Joseph Mosthaf.)

check that has been introduced in evidence I signed myself. I think I have told all of the conversation.

CROSS EXAMINATION BY MR. FULTON.

Witness continuing: At the time I drew this check for \$3000 I delivered it to Mr. Sheridan,—that is, he drew the draft himself and I signed it and he gave me this note and I took it away, and that is all there is to it.

BY THE COURT: Unless the defendant abstracted this amount from the bank I will sustain the objection. It is utterly immaterial.

The defendant offered and there was received in evidence the letter and release from the Bank Examiner to the witness Mrs. Barry and the same was marked as Defendant's Exhibit No. 14.

JOSEPH MOSTHAF,

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live at Riddle; am a farmer, and was one of the depositors of the First National Bank of Roseburg; I had a conversation with Mr. Thomas R. Sheridan relative to the loaning of some of my money; I was in Roseburg and went to the bank, I should say about in Jan-

(Testimony of Joseph Mosthaf.)

uary, 1908, and I had something over \$3000 in the bank, exactly how much I don't know; it was something over \$3000, and I spoke to Mr. Sheridan to put it out on good security if he got a chance, and he said he would. About two or three weeks, I should say about the 20th of February or thereabouts, he wrote me I had some school bonds,—Roseburg school bonds for \$3000; I think I went down and told him to keep them there and when they came in it was bonds came in at different times, two, three, and five years, I think it was. Well we had different business and in 1911 one of them bonds came due. I was down about January or thereabouts and I went in to Mr. Sheridan and I told him when the bonds came due,—a bond of \$800, to loan it out again for good security, the same as these school bonds, and he said he would.

It was admitted that a memorandum check of date February 24, 1911, and a promissory note are entirely in the handwriting of the defendant, and the Government offered the memorandum check in evidence and it was received and marked as Government's Exhibit No. 74.

It was admitted that by this memorandum check, \$800 on this date was taken from the account of Mr. Mosthaf.

The promissory note of date February 22, 1911, signed by the defendant Sheridan in the note of \$800, payable to the order of Joseph Mosthaf were received and marked as Government's Exhibit 75.

(Testimony of Joseph Mosthaf.)

Witness continuing: In regard to the check of date February 24, 1911, I got it very shortly after the 25th.—I think it came. It might come in the bank account,—what I mean with the bank book. I did not go to see anybody about it; I might have wrote Mr. Sheridan in regards to it,—I would not say I did. I have got no letter any more and I don't know, but anyhow I got a letter from Mr. Sheridan in which he informed me that he put my money out on good security; I mislaid or lost the letter; I do not know where the letter is now,—I looked for it and I cannot find it. I have mislaid it I guess. I did not go down and talk to Mr. Sheridan about it. In 1911, I spoke to Mr. Sheridan again,—that is before the school bond became due. Later I had another conversation with Mr. Sheridan. I got a letter from the Bank Examiner Mr. Goodheart, I guess is his name; he wrote me a letter,—I don't know the exact words; I read the letter and of course I could not say now, the letter seems kind of funny; I could not understand it, so I went down in the bank,—in the Douglas National Bank, and saw Mr. Sheridan about it, and showed it to him, what the letter meant, and he told me it is merely a matter of form and to sign it, which I did. He talked a little over affairs and so the way I stated before, and afterwards I asked him in regard to the money, the \$800, and he said he let it out on good security, and if I would take his personal note, which I did; he gave me his personal note then; this was after the date of the Bank Examiner's letter that he gave me the note; he told me to come back; I was

(Testimony of Joseph Mosthaf.)

coming after the train; the train comes at 1 o'clock I think and he told me to come to the bank, and I went out of the bank and around town and attended to some business, and he told me to come back at 4 o'clock and he delivered the note; the note is Government's Exhibit No. 75, dated February 22, 1911. This was the first time that I knew that I had Mr. Sheridan's note for my money. I really did not understand. I had one conversation with him about the school bonds and other conversations, but not pertaining to this matter; but before I received the Bank Examiner's letter I did not have any other conversation with him about loaning my money to my recollection. The release of date June 20, 1911, is the one that I signed; no part of the note of \$800 has ever been paid.

The release signed by Joseph Mosthaf was introduced by the defendant in evidence and was received and marked as Defendant's Exhibit No. 15.

CROSS EXAMINATION BY MR. FULTON.

Witness continuing: I had some money in the bank in 1908 and I told him to loan it out for me, and he said he had some school bonds; later on he informed me he had them school bonds; the school bonds were all right and I did have them and got interest on them, and they ran along until the school bond of \$800 became due, and then I told him to loan the money out again, but to loan it on good security; I accepted the note when he gave it to me when I came down with the letter from the National Bank Examiner.

(Testimony of A. William Wende.)

The defendant offered and there was received in evidence a letter of date March 4, 1912, marked defendant's Exhibit No. 16.

A letter of date October 5, 1915, marked Defendant's Exhibit No. 17.

A letter of date November 11, 1912, marked Defendant's Exhibit No. 18.

The witness admitted the authorship of the letters.

A. WILLIAM WENDE,

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live in Roseburg; am 63 years of age, and have lived there 19 years, and am a farmer by occupation; I have known Mr. Sheridan ever since I have been there, and during all of this time have been a depositor in the First National Bank of Roseburg. I had a talk with Mr. Sheridan about ten years ago; I asked him that my money stood there, and I would like if he wants to see that I could get some interest in some way, and he said yes, he could fix that all right, but I asked him right away if the bank would be responsible and he said yes, to me. And on that account I loaned it out and I got my papers there in little checks of \$25, \$50 and so on, little loanings, and he explained it to me and I was satisfied because the bank's stamp is always on it. And

(Testimony of A. William Wende.)

later on as Mr. Goodheart spoke with me, he went out on my place, Mr. Goodheart, and he told me if I allowed Mr. Sheridan to loan my money out, and I said yes, I did. That is what I did and I told him the circumstances too, and Mr. Goodheart he told me he wanted to write a letter to me, and so I got that letter, and I went to Mr. Sheridan about that letter before I signed it. Mr. Sheridan was in the bank at the time,—the Douglas Bank, or anyhow he was an officer, and I seen him, he was sitting there, and then I told him what I should do in that case, and he said, “did you sign that already?” “No,” said I, “I haven’t signed it yet.” “Well, you could sign that, that is just the same, I sell pretty soon some timber claim and then I pay the money back,” and that is all right and I sign it in the presence of Mr. Sheridan in the bank in Douglas Bank, and he took the letter as it was and fold it up and put in the envelope and put in his pocket. He said he want to put it in the letter box and I trust Mr. Sheridan he will do all what is best or honest, so I have no idea which the way it came out.

The memorandum check of date April 17, 1909, and the promissory note of the same date were both admitted to be in the handwriting of the defendant, with the exception of the printed matter, and that by the memorandum check of date February 17, 1909, \$1010 of the depositor’s money was taken out of his account.

The Government offered the memorandum check and the note in evidence and they were received,—the

(Testimony of A. William Wende.)

memorandum check was marked Government's Exhibit No. 76, and the note was marked Government's Exhibit No. 77.

Witness continuing: No part of the note has ever been paid. In regard to Government's Exhibit No. 76, the memorandum check I never seen that at all except when Mr. Coshow gave me the whole bunch, and this note was there, that I examined because I didn't know anything about it, so I trust it would be all right, but I have never seen this. Mr. Coshow is the lawyer who gave it to me, that is the first time I ever saw it.

It was admitted that Coshow is the attorney for the trustee of the bank.

Witness continuing: Mr. Coshow gave me that memorandum check after the Bank Examiner had left. I got the whole bunch at one time. I did not have my bank book. I asked many years for it,—I never could get my bank book back; asked everywhere, Mr. Sanford and Douglas National Bank, and Mr. Joe Sheridan and I asked him if he looked in the vault of Douglas Bank and he said "That might be possibly in my brother's desk." Mr. Joe Sheridan he looked for that bank book and I demanded it many times. This release you showed me is a photographic copy of the one I signed at the request of Mr. Sheridan. I can read English but there are some words I can't quite get to it.

(Testimony of A. William Wende.)

CROSS EXAMINATION BY MR. FULTON.

The Goodheart letter and release was offered by the defendant and received and marked as Government's Exhibit No. 19.

Witness continuing: The note and memorandum check bear date in February, 1909; before we had a little accounting in the back part of the First National Bank, and he showed me all the little amounts that were repaid in the bank account with the bank stamp on, and these what I got later from Coshaw I never seen before, and never know anything there was such a thing there. I had just one talk with Mr. Sheridan about loaning; I know nothing from notes; that was all them little notes, twenty-five dollars and so on from other people, nothing from him, I know nothing, he never told me. I told him he could loan the money; that is I asked him if there wasn't some way you could loan your money so as to get some interest on it with the request that the bank should be responsible; and he said yes, that could be arranged, and on that authority I expected him to make the loan, and that is the only talk I ever had with him. I know nothing about any payment being made on the note. I did receive one payment of five hundred dollars on the note after the consolidation of the bank. Mr. Sheridan he was in California and I told Joe Sheridan I needed the money and Mr. Sheridan sent me it and I got the benefit of it.

(Testimony of A. M. Kelsay.)

**REDIRECT EXAMINATION BY MR.
REAMES.**

Witness continuing: I did not see the note—that was all translated through Mr. Sheridan at the time of the payment; I only got \$500; it might have been a payment on another note of T. R. Sheridan in my favor of date May 6, 1907.

A. M. KELSAY

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live in El Centro, California; I formerly lived in the State of Oregon in Harney County during the years 1909, 1910, and 1911; during this time I was in the sheep business, connected with Mr. T. R. Sheridan, and he was financing me; I considered that we were interested in the sheep business together. I never authorized or told Mr. Sheridan to sign my name to any notes; I never had any conversation with Mr. Sheridan relative to any notes; I do not know how many notes, if any, he signed for me, or their amounts, and I never paid any note that he signed for me. In regard to Government's Exhibit number 47, a demand note dated August 10, 1909, signed A. M. Kelsay, T., \$300; demand note of January 25, 1910, A. M. Kelsay, T., for \$540.32, Gov-

(Testimony of A. M. Kelsay.)

ernment's Exhibit 40; Government's Exhibit 38, a note signed A. M. Kelsay by T., demand, \$745; May 10, 1910, A. M. Kelsay per T. R. S., \$700, Government's Exhibit 27; Government's Exhibit 29, note signed A. M. Kelsay, dated October 6, 1909, \$1,000; Government's Exhibit No. 60, note signed A. M. Kelsay by T., dated March 18, 1910, favor Mrs. Tim Barry, \$500; Government's Exhibit 54, note for \$3,000, payable to Mrs. W. T. DeWar, signed A. M. Kelsay per T. R. S., dated November 26, 1909; I have examined these. I first saw some of these notes when I was before the grand jury—I don't remember which ones, and the others I never saw them until now. It was understood between Mr. Sheridan and myself that he could use my name in any way that he wanted to; that he could sign any kind of a paper, use my name in any way he saw fit, but there were no particular papers or notes mentioned, only in a general way, if it became necessary to sign my name, he had a right to do that; I presume he had authority to borrow money for me; I don't just remember if I ever told him to borrow money for me; we were having quite a lot of business together; I don't know that I ever told him to borrow any money, but it was understood in a general way; I knew in a general way that Mr. Sheridan was borrowing money to finance me and I felt that he had a right, a perfect right, to use my name in that connection, and if it was done I did not consider Mr. Sheridan was doing it for his own. I cannot tell you the date of any conversation at any time or place where I ever told him to sign my name

(Testimony of B. C. Agee.)

to any notes for borrowing money and I never did pay any of the notes.

CROSS EXAMINATION BY MR. FULTON.

Witness continuing: It appears from the books that the money that was borrowed on these notes was carried to my account and that I was given credit for it and that is entirely a legitimate transaction as far as I am concerned; and I recognized, with the understanding I had, that Mr. Sheridan had complete authority to do that—to sign my name to the notes and carry the money to my credit to any instrument he saw fit. I never questioned his authority in those respects; I have had large transactions with Mr. Sheridan and have owed him as high as \$40,000 or more, and paid it; he was financing me in my enterprises and growing out of these large transactions I had recognized his authority to do these things for me; I did not know until February, 1914, that he had done these things.

B. C. AGEE

Recalled as a witness, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

In regard to Government's Exhibit number 24, a note dated May 1, 1908, payable to M. S. Doestler, signed B. C. Agee, per T., for \$469, a note of June 29, 1907, Government's Exhibit 45, signed B. C. Agee,

(Testimony of B. C. Agee.)

per T., I have examined these two exhibits and the first time I ever saw them was after the Douglas National Bank had taken over the First National Bank; I never told Mr. Sheridan to sign my name to either one of these notes; I was a partner with Mr. Sheridan.

CROSS EXAMINATION BY MR. FULTON.

Witness continuing: I was in partnership with Mr. Sheridan for 17 years, during which time he was financing me, taking care of my business, and carrying it on for me, and he helped me in my financial matters; at that time I relied on him almost entirely to be financed; I understand that it is proven here that this money went into my account and that I was given credit for this money; I don't know whether it was the understanding or not; he always handled the money and we attended to the ranch; he handled the money; I left that all with Mr. Sheridan.

RE-DIRECT EXAMINATION BY MR. REAMES.

Witness continuing: I have never paid any of these notes and I never paid any interest on them either.

(Testimony of Mrs. Elizabeth Byron.)

MRS. ELIZABETH BYRON

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live at Ollala, sixteen miles from Roseburg; I have known Mr. Sheridan ever since he was a little boy; I was a depositor in the First National Bank of Roseburg; I had a talk with Mr. Sheridan about loaning my money for me; my husband died in January, 1902, and it was after that that I was in the bank putting some money in, and Mr. Sheridan said to me, "You have got too much money, Mrs. Byron, lying in the bank idle." And I said, "What will I do with it—if I loan it I lose it." And he said, "Leave it here and we will use it and it will make seven per cent for you and one for the bank." I said, "All right." I did not have any further talk or agreement with him about loaning my money.

(The Government offered in evidence the memorandum check of Mrs. John Byron for \$1080.25, the defendant admitting that it was entirely in the handwriting of the defendant; it was received and marked as Government's Exhibit number 78. It was admitted that by that transaction that amount of money went out of her account and went to the account of Hanan, guardian.)

Witness continuing: I don't remember of ever get-

(Testimony of S. A. Sanford.)

ting a note for any of that money; no part of the money has ever been repaid; I knew Mr. Hanan.

CROSS EXAMINATION BY MR. FULTON.

Witness continuing: I spoke to Mr. Sheridan about loaning my money in the bank in the year 1905; he said that I had too much money in the bank lying idle; I had \$3,000 and he said they could loan it out and make seven per cent; my husband had put it nearly all there and I put a little more there and made it three thousand dollars; it was to make one per cent for the bank and seven per cent for me by loaning it out. I supposed the bank was all right.

(The defendant offered in evidence the letter of date August 4, 1912, which was marked as defendant's exhibit number 20. The letter of date October 30, 1912, which was marked defendant's exhibit number 21; the letter of date March 23, 1913, marked defendant's exhibit number 22; the letter of date October 23, 1912, marked defendant's exhibit number 23; the witness admitting the authorship of all said letters.)

S. A. SANFORD

Recalled on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I have already identified Government's Exhibit number 5 as the minute book of the First National Bank

(Testimony of S. A. Sanford.)

of Roseburg; it contains a list of the meetings held by the board of directors and the stockholders and the business transacted at those meetings. For a period of five years I was the cashier of the bank, starting in between 1905 and 1906, and am the present trustee of the First National Bank in liquidation. For the past two or three years O. P. Coshow has been acting as my attorney in that capacity; the minute books of the corporation were accurately kept so as to show the transactions occurring at the meetings of the board of directors and at the meetings of the stockholders.

Q. Was the matter of the drawing of these memorandum checks on the accounts——

MR. FULTON: If that is your purpose in that examination I will say that we do not contend that any of these matters were taken up with the board of directors.

COURT: I don't think it is necessary anyhow under the statute.

MR. FULTON: I don't think so either.

COURT: But it is conceded they were not.

MR. REAMES: It is stipulated it is not necessary?

MR. FULTON: No, the court says it is not necessary, I don't stipulate. I don't say what my position is in that matter, I mean what the law is, but we do concede there is nothing in the minutes about it.

Q. Did the bank so far as you know ever give its

(Testimony of S. A. Sanford.)

consent to the drawing of those memorandum checks by Mr. Sheridan?

A. No, sir.

Q. And if it had given——

MR. FULTON: Now, that is objected to, the question is, what has the bank.

COURT: The board of directors are the managing officers of the bank.

MR. FULTON: I don't think they have a right to ask that question in that way. If it is material that is not the way to prove it. The board of directors, as Your Honor says, is the bank so far as exercising the powers and functions of the corporation are concerned. That is all there is of it.

MR. REAMES: I would like to ask two questions, if the Court please.

Q. Then did the board of directors at any time while you were cashier of the bank ever authorize those transactions?

MR. FULTON: What the board of directors did is proven by the minutes. The minutes we concede have nothing. I can't see why counsel insists on this, but what the board of directors did is proven by their records and they didn't do anything.

COURT: I think the records are prima facie evidence of what they did and if they contain no evidence of it the presumption will be that they did not.

MR. FULTON: Of course, we contend—our position is that so far as the board of directors are con-

(Testimony of S. A. Sanford.)

cerned they could not have given the authority to make a loan for these parties, the parties alone would give that authority. We are claiming our authority anyway from these parties.

MR. REAMES: I think anyway I will stop.

Q. Now, then, Mr. Sanford, you say you are trustee of the First National Bank. The bank is still in liquidation, is it not?

A. Yes, sir.

Q. Now, Mr. Sanford, you are acquainted with the names of those people who have testified here, you have been in the court room right along, haven't you?

A. Most of the time; yes, sir.

Q. You know who they are?

A. Yes, sir.

Q. When the Douglas National Bank took over the First National were any of those amounts represented by those memorandum checks that have been introduced in evidence carried into the accounts of the Douglas National?

MR. FULTON: Wait; don't answer that. It is immaterial whether they were or were not, Your Honor; that would be something after the fact over which we have no control, for which we would not be responsible. You have shown the record, all the facts of these transactions are found in the record and that appears; now it is for him—that is, our liability rests on that, if we don't get justification out of that we have no justification—that is, I mean out of that and out of the testimony.

(Testimony of S. A. Sanford.)

COURT: It occurs to me that is the situation.

MR. REAMES: I will say to Your Honor frankly I only offer the proof as confirmatory matter and in order to complete the record. Now, there is evidence that the First and Douglas have merged and I believe it is material to be proven, which I can by one question, that none of these amounts represented by these memorandum checks——

MR. FULTON: Don't make a statement.

MR. REAMES: I think it would be material, otherwise it might be argued that these people's money is probably in the Douglas National Bank.

COURT: I don't see how that could be argued; the money was drawn out; how it could find its way to the other bank I don't know unless some stranger put it in there. I will sustain the objection.

MR. FULTON: Ingenuity only of the attorney for the Government could conceive such an argument.

MR. REAMES: Will it be admitted that it wasn't?

MR. FULTON: That is not the question. I say it is immaterial and nothing for the jury to consider at all; nothing to go before them.

COURT: I will sustain the objection.

(Testimony of J. F. Hoover.)

J. F. HOOVER

A witness called on behalf of the Government, testified as follows:

DIRECT EXAMINATION BY MR. REAMES.

I live at Myrtle Creek and am section foreman for the Southern Pacific Company; I have lived there seventeen years, and was a depositor of the First National Bank of Roseburg; I had a talk with Mr. Sheridan about loaning my money out; I think it was in December, 1908, I was in the First National Bank, and I told Mr. Sheridan I had about \$2700 in the bank at that time; I told Mr. Sheridan that I would like to loan the money out, for him to look out for a good loan for it, with good security, and he said he would, and that was all that was said. I had never had any other talk with him about it.

(The Government offered, and there was received in evidence, a memorandum check admitted to be entirely in the handwriting of the defendant, amount \$2500, which was marked Government Exhibit number 79.)

Witness continuing: I first saw this memorandum check in August, 1909, when it was sent to me with a statement from the bank with the other vouchers returned. No part of it has ever been paid and I never received any note for it.

BY MR. REAMES: This is for the purpose of proving intent.

(Testimony of Richard W. Goodheart.)

Witness continuing: I did not know what R. S. S. meant, and do not know positively now. I went down to Roseburg to see Mr. Thomas R. Sheridan. I went into the First National Bank and asked Mr. Sheridan how about that, and he was pretty busy at the time, and he said: "That is all right," and I did not have any further conversation with him at that time. I seen Mr. Sheridan once after the banks were consolidated in the Douglas National Bank. I asked him just a word or two about it, and he gave me practically the same answer; he said it was all right.

CROSS-EXAMINATION BY MR. FULTON.

Witness continuing: I got this memorandum check with my statement from the bank in August, 1909, and I did not know who the R. S. S. was, but I supposed it was a loan for me.

BY MR. REAMES: The Government will rest.

RICHARD W. GOODHEART

A witness called on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. FULTON.

I reside in Pensacola, Florida, and was formerly a bank examiner of the United States; I held that position for six years and was a bank examiner in the year

(Testimony of Richard W. Goodheart.)

1911; at that time I made an examination of the First National Bank of Roseburg in the month of June. As to Mr. C. E. Marks, an elderly German of robust form, if that is the man that came into the bank, and with whom I had a conversation regarding his deposit, I remember him. I had a conversation with him; he was just either going on a trip to Europe or returning from Europe.

BY MR. FULTON: Now state what conversation there was with him?

A. Why, I don't remember the words.

MR. REAMES: If the Court please, as I understand, this is an impeaching question and I contend that they would be limited to that impeaching question.

MR. FULTON: No, Your Honor, while we might be, we contend that we are not, we contend for the purpose of showing an agency you can prove the declarations and admissions of the principal and this is for that purpose more than for anything else. We asked Mr. Marks that question and stated the place and circumstances and I am putting this on the ground that we have a right to prove agency by the declaration of the principal. Mr. Sheridan, for instance, would have a right to show what they told him, unquestionably, without any regard to impeaching questions. We can tell that they did tell him by their subsequent declarations or admissions. It is nothing more or less than the ordinary case of an agency, did he have authority? If he had authority we can determine that question

(Testimony of Richard W. Goodheart.)

directly as to what was said by the parties or by what was a declaration of the party against his interest subsequently.

COURT: That would undoubtedly be true as to anything that preceded the transaction; whether it is equally true as to what follows or not, I am not prepared to say.

MR. FULTON: I know of no rule, I have looked and can find nothing to the contrary.

COURT: But this is substantially the impeaching question anyhow, so he can answer it.

MR. REAMES: I would like to make one suggestion to the Court in line with the Court's suggestion, and that is that nothing Mr. Marks could have said, nothing that he could have written at that time would have created any agency which didn't exist before, nothing that he could have done after that transaction. Any statement that he made—this witness has already been on the stand, full opportunity was given to ask an impeaching question, in fact an impeaching question was asked of him. Now, I think it is clearly within the rule that before a witness can be impeached that the time and place and persons present and conversation must be related to the witness.

COURT: When the witness himself admits the question it is not necessary to call his attention to the time and place of course.

MR. REAMES: But the conversation must be called to his attention.

(Testimony of Richard W. Goodheart.)

MR. FULTON: It was, as far as Mr. Marks is concerned.

COURT: As far as this witness is concerned he may answer.

A. I don't know what he said. I don't know his exact words, I can only remember generally that what he said in effect, as I would remember the general effect of any queries that I was making, that he had authorized Mr. Sheridan to loan his money for him. It was done—when it was withdrawn from his account it was done with his authority.

Q. Did he make that explanation to you?

A. That is my remembrance of it.

Q. Now, Mr. Goodheart, don't answer—of course this question, there may be an objection to it—until the objection is heard. Do you know what the general custom is in banks of the character of this one in question in the matter of the officers of the bank making loans for their customers and evidencing that by a deposit charge check such as I hand you, being Government's Exhibit 74. I hand you that simply as a sample.

MR. REAMES: The Government objects, if the Court please. If every national bank in the country was doing that that would not make it right.

COURT: You meant with the authority of the depositors or without.

MR. FULTON: I mean to say that that by itself is not a circumstance, that is customary. Now, there are many things that may be taken as circumstances in-

(Testimony of Richard W. Goodheart.)

dicating the wrongfulness of the act, a person unacquainted with the customs might think that that very circumstance of itself was persuasive in favor of the contentions of the Government, whereas one who knows the customs of the bank would know that that wasn't.

COURT: Are you limiting your questions to cases where they are authorized by the depositor?

MR. FULTON: I had that in mind where they are authorized.

A. It is customary among the banks for the officers at times to put in a charge slip against the customer's account where they are authorized.

Witness continuing: Very often the customer says when the note is due, "Just charge that note up to my account," or making an investment, "Just purchase such and such a mortgage for me, or securities and charge it against my account." And a charge slip, the sort known in banking as a charge slip would be placed in the account. This is a charge slip.

CROSS-EXAMINATION BY MR. REAMES.

Witness continuing: It is not a customary way for a banker to borrow money for himself in national banks in this manner. The examination of the bank was begun at 3:30 P. M. on June 18th; I could not say what day I left Roseburg, but I generally put in one or two days in which to make my report; the examination ended at 6 P. M., June 20th, and I presume that is the day I

(Testimony of August Schlormann.)

left Roseburg. You have now shown me my report to the comptroller from Seattle; it is dated June 24, 1911, from Seattle, so I must have finished my examination of the First National Bank at Roseburg on the 20th and must have left Roseburg at that time in order to have gotten a report from Seattle on the 24th. I am not sure when these releases were sent out in the mail; I don't know whether I mailed them from Roseburg or Seattle; I had a conversation with old man C. E. Marks; I do not remember that he gave me a release; I interviewed two of these depositors that I remember of—I think I interviewed a third, but I would not be sure of that; I did not interview any more; I put Mr. Sheridan on oath at the beginning of the examination and secured from him the information relative to the notes. He showed me a number of memorandum notes that he had made and stated that he had borrowed the money—a large part of it personally, from these people, and that they had authorized him to make the charge and use their money; I got that information from Mr. Sheridan but it was given to me after I had gone to the books and picked out a number.

AUGUST SCHLORMANN

A witness called on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. FULTON.

I reside on a ranch about 20 miles from Roseburg, and have lived in Douglas county for 25 years, and am

(Testimony of George A. Crane.)

acquainted with Mr. Sheridan and with the witness W. J. Carlon; I remember having a conversation with Mr. Carlon after the banks consolidated; I went to his house and stayed all night; he was bemoaning the loss of his money and he said, "I gave Mr. Sheridan the authority and here I have lost my money. I told him to use it, get a little out of it, and here it is all gone." Well, he made that explanation; you can understand the old man was in trouble; he said he had given him authority to use it; he did not use the exact words but that is what he implied.

CROSS EXAMINATION BY MR. REAMES.

Witness continuing: This conversation occurred in a hovel behind the livery stable where Mr. Carlon lived; I live twenty miles from Roseburg.

GEORGE A. CRANE

A witness called on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. FULTON.

I live at Roseburg, Oregon, and have lived there all my life; I am an investor; in the fall of 1913 at Smith's livery stable in Roseburg I had a conversation with Mr. David Hull, with reference to the money he had on deposit in the First National Bank; the question arose as to wage earning and as to times and general

(Testimony of George A. Crane.)

conversation, it was mentioned that he had once had funds in the bank; that he did not now have, and he spoke as though they were in a way that he could not get hold of them to handle them as he saw fit, and I asked him what he had done with them, and he said that Mr. Sheridan had loaned them, had used them, and I asked him if he had any authority to do it, and he said yes, he told him to. I am acquainted with Mrs. DeWar, and heard a part of her testimony on the stand; I had a conversation with her about selling a note; this was about a year ago last February, as near as I can recall; she had just returned from Portland and I was conversing with her at the depot; it came up in a conversational way about her having funds there and having lost them, and I said, "Have you nothing to show for it?" "Yes, I have a note." And I asked her whether the note is the bank's or Mr. Sheridan's, and it was neither and she mentioned some one, Kelly or some one, I could not recall; she said she would take considerably less than face value for it, but she did not try to sell it to me.

CROSS EXAMINATION BY MR. REAMES.

Witness continuing: This conversation was in February, 1914; it was immediately following the investigation of the federal grand jury in Portland.

(Testimony of Irving Gardner.)

IRVING GARDNER

A witness called on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. FULTON.

I live at Riddle in Douglas County, Oregon, and have lived there since the spring of 1907; I am acquainted with the witness W. J. Carlon; I overheard a conversation between Mr. Carlon and the defendant Sheridan—this was in the late winter of 1910, or the spring of 1911—either in March or February, or January, 1911, or late in December, 1910, but I think it was in the early spring of 1911. Mr. DeWitt Van Ostrand, myself, Mr. Sheridan and Frank B. Waite, part of the time, were present; this was in the bank; this was before they had gone over to the Douglas National Bank; we were talking about some timber which Mr. Sheridan was handling the timber deals for us; he was taking care of the deeds and mortgages and handling the money for us and timber. Mr. Carlon came back—started in the office, Mr. Sheridan says, “I am a little busy, Bill,” and he kept right on coming; he is sort of deaf, and he said, “What is that?” And he approached Mr. Sheridan and asked him either if he had invested his money or would invest his money for him as he wanted to get some interest. He was getting no interest. Mr. Sheridan jokingly said, “I might lose it for you, Bill.” He said, “Oh, no, Tommy, you would not do that.” That fixed it on my mind as I had never heard Mr.—

(Testimony of Frank B. Waite.)

I had always heard him called Mr. Sheridan, never Tommy. He said, "Oh, no, Tommy, you would never do that."

CROSS EXAMINATION BY MR. REAMES.

Witness continuing: I am the managing agent of the Neenah Oregon Land Company, and raising chickens. I am a timber cruiser and buying timber lands; this conversation was either in March or February; it was some time after Christmas and prior to the first of April, 1911. I am absolutely sure of the dates.

FRANK B. WAITE

A witness called on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. FULTON.

I live at Sutherlin in Douglas county; am a farmer by occupation and have lived there 37 years; I am acquainted with Mr. Sheridan and with the witness W. J. Carlon; I heard a conversation between Mr. Carlon and Mr. Sheridan in the bank, the First National Bank, in the spring or thereabouts, of 1911; Mr. Carlon came in and I said to Mr. Sheridan, "Well, you are busy now, I will see you later." I went in to see Mr. Sheridan on some business and I walked out and Carlon came in. I heard Mr. Sheridan say to Carlon at the time that he was busy, but as to hearing any conversation, I did

(Testimony of Frank B. Waite.)

not stay to hear it; I have had several conversations with Mr. Carlon later; I can't exactly identify the time; it was since the consolidation of the two banks; I had a talk with Carlon before Sheridan made an assignment for the benefit of his creditors; this was at the Umpqua Hotel in Roseburg.

Q. Well, what was that conversation?

A. Why, Mr. Carlon claimed that—he told——

MR. REAMES: Is it claimed this is impeachment?

MR. FULTON: I think I asked him.

MR. REAMES: I have no record of the question being asked and object on the ground it is not impeachment.

COURT: In so far as these witnesses are present at the present time the Court will permit the defendant to recall the witness and lay the foundation for the impeachment. I think it is only fair it should be done, if you insist on it.

MR. REAMES: I think that is the rule, if the Court please.

COURT: The witness Carlon is in the Court room, if you desire to lay the foundation, otherwise I would sustain the objection on the same ground I did the other until I look into the question further.

MR. FULTON: The only thing is, I don't want to delay the Court, and I don't want—I want to have that matter determined, because I don't want to feel that

(Testimony of Frank B. Waite.)

we have to depend on purely impeaching testimony for this character of—

COURT: Of course the testimony of the last witness went to the original authority and was not impeaching in its nature, but this other is, in my opinion.

MR. FULTON: It might operate as impeaching as well as proving agency. Of course the rule is that a declaration by an agent subsequent to the execution of the authority cannot be admitted, but I have supposed always the declaration of the principal could.

COURT: Not as to third parties, I do not think.

MR. FULTON: Not as to binding third parties, I will admit that is true, but here are the parties coming in about their own money.

COURT: If this was a civil action between the parties I am inclined to think you are correct, but I do not think in a prosecution by the government subsequent declarations would be evidence.

MR. FULTON: It would tend to establish the agency, and because it was necessary—now, here the depositor is a party in interest here; it is necessary to this because of the wrongful act done him, the taking of his money, as he alleges that is the basis of this action. Now, I confess I can't see the difference. He has alleged it is taken without his consent, the question purely is a question of agency, and it must depend entirely on whether he gave him authority. If the authority had to flow from some other source, if the authority had to flow from the government, but the authority had to

(Testimony of Frank B. Waite.)

flow entirely from him, and therefore it resolves itself purely to the question of agency, because it is against his interest, he is on the stand testifying there was no agency; now, it is a declaration against his interest and tends to prove the contention of the defendant, it seems to me.

COURT: Oh, certain other elements have to participate before you can prove a declaration against interest.

MR. FULTON: It has to be an action between the parties, I admit; an action between a principal and a stranger, the stranger would not be bound by a declaration of the principal. I admit that is true as to the agency; that is, you could not prove the agency as against the third party by the party who was asserting it, but it does not occur to me that that is the situation here altogether, Your Honor. Of course, the Government comes in and takes up the proposition on the theory it is not a question of binding the Government—the Government takes up the proposition on the theory there was no agency based on the declaration of the party—on the declaration of the depositor. Now, the Government is not seeking to recover of him for something that was done because the agency did not exist, the government is simply seeking to punish him because he did this without the agency, this other party asserting that there was no agency. Now, we are placed in exactly—it seems to me precisely the same position where it is a controversy between the agent and the

(Testimony of Frank B. Waite.)

principal, as to whether or not there was an agency; it all goes back to the agreement between the parties.

COURT: There would be this distinction, the principal might ratify in so far as he himself was concerned, but he could not ratify against the Government.

MR. FULTON: Ratification, of course, assumes that there was no original agency, and we are not putting it on any ground of ratification.

COURT: I will adhere to my original ruling at the present time and if I change my mind during the noon hour I will let you know.

Q. State whether or not you had a conversation with Mr. William J. Carlon—what day did you say that was?

COURT: The day of the assignment, whenever that was.

Q. Just prior to the assignment, a short time prior to the assignment by Mr. Sheridan?

A. I had a conversation——

MR. REAMES: Just a minute.

Q. Relative to what, if any, authority he had given to Mr. Sheridan to take the money that was on deposit to his credit in the First National Bank, which is complained of in this action and to use it as Mr. Sheridan had used it. Did you have any conversation with him in respect to that matter?

COURT: He has just asked for information; he may answer yes or no.

(Testimony of K. Shannon Taylor.)

A. I did.

Q. Well now, state what it was.

MR. REAMES: The Government objects on the ground it is an impeaching conversation and no proper foundation laid.

COURT: I will sustain the objection.

MR. FULTON: Save an exception.

K. SHANNON TAYLOR

A witness called on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. FULTON.

I live at Oakland, Oregon, and have lived in Douglas county for fifteen years; I am acquainted with Mr. M. S. Doerstler; I had a conversation with him at the Roseburg Hotel some time probably in the year 1912; there was me and Mr. Doerstler and then up came John Watson; he stayed a while and talked and Sheridan came up too. We had a long talk there; we were talking there and Mr. Doerstler said he gave the money to Mr. Sheridan; that is all I remember about it; he did not say anything about his right to use it or anything of that kind; he said that he had given Mr. Sheridan authority to use the money and it was his money, and if he lost it it was nobody's business but his own, or words to that effect; he said he did not need it.

(Testimony of John L. Watson.)

CROSS EXAMINATION BY MR. REAMES.

Witness continuing: I think he said it was about \$5,000; I can't tell you the exact date of the conversation; I think it was in 1911 or 1912; I think it was in the fall of 1912, but I would not swear.

JOHN L. WATSON

A witness called on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. FULTON.

I live at Roseburg and have lived there over forty years; I have farmed up there and was a stock raiser. I know Mr. M. S. Doerstler; I met him one or two years ago for the first time; I had a conversation with Mr. Doerstler at the Roseburg Hotel; I think Mr. S. K. Taylor was there, but I do not know; I remember the conversation; Mr. Doerstler stated that he had placed this money in the bank of Mr. Sheridan or the First National Bank, which Mr. Sheridan had used and that Mr. Sheridan had used it by his authority, or with his consent, or words to that effect, and that if it was lost it was his money, and it was nobody's business, or words to that effect.

MR. FULTON: That is all there is on that branch of the case we have to offer, Your Honor. Will the Court allow me just a few minutes to consult—I will

(Testimony of John L. Watson.)

state to the Court that we would like to know definitely—of course I am not asking for it to say now, but it will make some difference with our plan if the Court—as to how the Court will ultimately rule respecting our right to show declarations outside of impeaching questions.

COURT: How much testimony will you have on that line?

MR. FULTON: Only be two or three witnesses.

COURT: You have called two already.

MR. FULTON: I think it is practically limited to those—just those two, I think, the only ones.

MR. REAMES: Are those the only two that you have?

MR. FULTON: That is my recollection.

MR. REAMES: If those are the only two you have the Government will withdraw its objection.

COURT: What are the witnesses?

MR. FULTON: Mr. Waite;—there is Mr. Orcutt——

MR. REAMES: That is all right, we will put him in too.

Henry L. Benson, Justice of the Supreme Court of the State of Oregon; August Schloemann, a rancher; Frank B. Waite, a farmer; Dexter Rice, County Judge of Douglas County; A. F. Stearns, formerly County Judge of Douglas County; Simon Caro, a merchant of

(Testimony of Frank B. Waite.)

Roseburg; A. M. Crawford, former attorney general of the State of Oregon; B. L. Hamilton, a merchant; Frank H. Churchill, a merchant; and W. F. Chapman, a druggist, all residents of Douglas County, Oregon, were called as witnesses for the defendant and testified that they had each resided in Roseburg, Oregon, for more than twenty-five years, during all of which time they knew the defendant; they knew what the general reputation was of the defendant for honesty and integrity in the community in which he resided, and that his reputation was good—the very best.

FRANK B. WAITE

A witness recalled on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. FULTON.

Mr. Carlon had a conversation with me in which he said that he had loaned the money to Sheridan; just took his note for it and he considered Tommy as good as gold, and he thought he was perfectly safe and wanted a little interest on his money to live on, and he had loaned the money to Tommy, and now he had lost it; I had this same conversation with him several different times; whenever we met in Roseburg he would tell me his troubles.

(Testimony of A. N. Orcutt.)

A. N. ORCUTT

A witness called on behalf of the defendant testified as follows:

DIRECT EXAMINATION BY MR. FULTON.

I am a lawyer and live at Roseburg, and have lived there twelve years; I do collecting; I know Mr. William J. Carlon; he put in my hands for collection some notes against Mr. T. R. Sheridan; this was in the fall of 1913; there were two notes; they are the same notes that were introduced in evidence; he brought them to me at that time and stated that he had loaned Mr. Tommy Sheridan all the money he had and had taken those notes for it, and wanted me to collect them; wanted to attach Sheridan's property if I could find any; he said nothing about Sheridan having authority to use the money or anything; he said he had loaned Mr. Sheridan his money on that note; there was no suggestion on the part of Mr. Carlon that the money had been loaned without authority.

THOMAS R. SHERIDAN,

The defendant, called as a witness in his own behalf, testified as follows:

DIRECT EXAMINATION BY MR. FULTON.

By the witness.

I am the defendant; am 64 years of age; have lived

(Testimony of Thomas R. Sheridan.)

in Oregon since 1856; I was born in Rochester, New York; in Oregon I have been engaged in numerous businesses; when I was ten years old I went in with my father in the stove and hardware business and worked until I learned the trade; and then I went to the country and was there two years herding sheep; then I telegraphed for a year and a half for the railroad company and the Western Union; from there I worked on the train with Wells-Fargo, then my brother and I went into the hardware business and remained in that business for twenty years; for six years of that time I was county clerk of Douglas County; I was in the First National Bank for nineteen years and seven months; the bank was established in June, 1911; I am a man of family and have a wife and two girls and a boy; I have known David Hull for eight or ten years; Mr. Hull came to the bank and asked me if I could not get some interest for him from his money; he said he did not want it to lie idle; I told him "yes"; I told him I could use it and he said all right; he says, "I don't need only a little money." He said, "It don't cost me much to live and I will have money from time to time that I will put in here and you can handle it for me any way you see proper." I loaned it from time to time and as the loans were paid off I would give him credit in the book and then loan it out again. I executed to him my notes which are Government's Exhibit 6 and Government's Exhibit 2. I evidently got the benefit of the one signed by my own name, and the one signed B. C. Agee by myself went to the credit, as I see by the notation of

(Testimony of Thomas R. Sheridan.)

March 3, 1911, of B. C. Agee's account. I put the notes in an envelope marked David Hull, and put them in the alphabet H, in the vault of the First National Bank; I left them there and never took them out. I drew the two memorandum checks for the purpose of putting the money out at interest; the memorandum checks were given to the bookkeeper, passed through the regular form by him, written up, and charged to the account of the party. I have never seen the release of David Hull, but I know it is here; he did not consult me before signing it. None of the persons who signed releases consulted me and I did not suggest to them to sign it or ask them to sign it, or call on any of them, or hunt them up.

Mr. Doerstler was another of the depositors that wanted interest on his money; he told me to take that money and handle it any way that I saw proper; this was shortly after he made his first deposit and in Roseburg; this was before I took the money and all these transactions were before I took the money.

In regard to Mr. Carlon, I met him as I was passing the barn where he used to be, on my way home. He was sitting on a bench in front of the livery stable. I says, "Bill, I would like to use your money; it is not doing you any good up there." He said, "Well, if I can get some interest and get it back you may have it." I says, "Do you consider that I would pay it back if I took it?" and he said "Yes." So I took it.

My signature is on Government's Exhibit Number 12, which is a note signed by me, and the charge check

(Testimony of Thomas R. Sheridan.)

by which the money was drawn is also signed by me. I asked him if I could use it myself and asked him if I was good for it, and I thought that I was; at that time I supposed I was worth about \$125,000 over and above my indebtedness—I felt confident of it. About a year ago I sent Mr. Carlon one hundred dollars from San Francisco, and my brother paid him fifty dollars in Roseburg.

In regard to count number 5, where it is charged that I appropriated five hundred dollars of the money of Mr. Carlon, I have examined Government Exhibit Number 14. This money was taken out of the same fund; at the time I had the talk with Mr. Carlon the money that was later taken out on these notes was then in the bank to his credit.

In regard to count number 4 of the indictment, Mr. Doerstler told me to lend his money out and use it in any way I saw fit. This conversation was in the First National Bank of Roseburg and was before I took the money.

In regard to the loan of Laura Verrell, I have to say that before the Crouch \$4,000 loan became due I wrote to Mrs. Verrell and told her that the money would soon be paid off and that if she wanted it to draw more interest, or words to that effect, that I could place it safely. My letter was dated April 6, 1911, and is Government's Exhibit Number 8. Shortly after that she came into the bank and as I remember, she did not have quite enough money there, and she put in some

(Testimony of Thomas R. Sheridan.)

money, and in the conversation I asked her if she wanted to lend that money out, and she said she did; she said she did not know exactly who to trust, and I asked her if she would trust me, which she said she would. Well, I told her as soon as I was able to place it I would advise her and charge her account and put the document in the usual place, which I did. The memorandum check went through the books and I suppose it went to her in the usual course of business. It went to the bookkeeper. It is a custom of the bank in respect to returning checks and drafts and papers by means of which money has been taken out of an account, to return the checks and drafts to the depositors. We tried to get the account books in every month; some people hesitated—they did not like to give up their books, but when we could make out their statements if they did not have the books. We tried to get their books however once a month. The bookkeeper would write them up and balance them and send these memorandum checks, or checks that they had drawn and return the books; when the books were written up they would show the condition of the account, what had been drawn out, and what had been put in, just the same as the bank books themselves would show. All checks that had been drawn would be charged up to that account, the book balanced, and the checks and book returned; and these charge checks would be returned to the depositors just as the others would be returned.

The next conversation I had with Mrs. Verrell was in the latter part of November, 1913; I met her son on

(Testimony of Thomas R. Sheridan.)

the street and he said his mother would like very much to see me; I said I would be glad to see her; he said that if she was well enough he would bring her in tomorrow, so he did. The following day she came into the Umpqua Hotel, went to the side entrance, a little parlor that was there, and she apparently was very glad to meet me. She said she was, and said she was sorry I was having trouble. At that time I had made an assignment and she said her husband had always thought a great deal of me, and I had attended to his business when he was alive, and she had the same friendly spirit for me; she said that she did not need the money, or that she did not want the money, and she said that all she wanted to know was that she was going to get it some time; and I told her that if I lived I would surely pay her; and she said that she was glad to hear me say so, and after a few other casual remarks we parted.

In regard to the six thousand dollar count in the indictment for the amount of \$260 of the money of Mr. Doerstler, it was taken on the same authorization. I gave for that money Government Exhibit Number 20, and the memorandum or charge check was the check which transferred the money. I put the note in Mr. Doertsler's envelope and put that in the bank in the letter "D".

In regard to the seventh count of the indictment, which refers to the appropriation of \$5500 of the money of J. E. Hainey, Mr. Hainey asked me if I could not get some interest for him, that there was too much mon-

(Testimony of Thomas R. Sheridan.)

ey there; I told him I could and he told me that I could take it and use it in any way I wanted to, but he wanted my endorsement, and pursuant to that I took the money. I signed Government Exhibit Number 16 and the accompanying memorandum check, which check was returned to him in the proper course of business. The note of Mr. Hainey's was subsequently paid.

In regard to the eighth count in the indictment, charging the alleged misappropriation or taking of \$5000 of the money of C. E. Marks, the circumstances were about the same as the others. Mr. Marks told me he could not afford to leave his money lying idle, he wanted me to handle his money, which I did.

In regard to Government Exhibit Number 35 and Government Exhibit Number 36, I executed those notes and also executed the memorandum check, Government Exhibit 34.

In regard to the sons of Mr. Marks, who testified, I have to say that at the time Mr. Marks opened up the accounts, about the same time in fact he opened the accounts for the boys, and told me to take the boys' money and use it just the same as my own; he told me that they would rather trust me as I knew more about those matters than they did, and he would bring in the bank book often and make deposits for them, and take the books away again, and until very late in the season, a while before the boys commenced putting in the money for themselves, but he did most of the business for some time. He was living five miles from Roseburg, and

(Testimony of Thomas R. Sheridan.)

they were on the ranch with him, with the exception of the one son who was at Gardner. None of the Marks boys ever came to me and talked to me, or ever showed me any of the so-called release letters from Mr. Goodheart. I did not know who Mr. Goodheart had written to. I did not go to anyone who was supposed to have received a letter, and took no part in that at all. I left that entirely to them.

Mrs. Verrell brought the release document in to me and she said, "Mr. Sheridan, I received this document; what shall I do with it?" I said, "If it is correct, Mrs. Verrell, why sign it." I did not see it or take it in my hands at all. She laid it on the desk there, but I did not pick it up. I never at any time made any statement to any of the Marks boys or any person other than the Marks boys, in which I told them or anybody else that the Goodheart letter was a mere matter of form.

When the financial trouble came upon me I was a wreck. It has only been in the last few months that I have begun to feel any better, or felt as I used to feel—the surprise was so great to me; it affected my mind and memory; I thought I was worth at least \$125,000 above all of my liabilities. I had borrowed from a Mr. Boldgett \$80,000, and as security had assigned my interest in the Oregon Land & Livestock Company, which was a one-twentieth interest in 150,000 acres of timber land in southeastern Oregon; I had been paying him his interest promptly, which was high—seven per cent—paying it every three months. He finally notified me that he wanted his money, and I could not get it, and he

(Testimony of Thomas R. Sheridan.)

gave me \$28,000 more and took my stock. I considered that he got it for \$130,000 less than its value. We had a sale on it for five million dollars for the entire tract and my interest would have been \$250,000, as I had a one-twentieth interest in the tract.

Then I had other misfortunes of a financial nature that overtook me in those times. I lost \$40,000 in a real estate deal that I was gotten into by an Oakland banker, and when all these matters came about my health was seriously affected. But back in 1911 I was feeling that I was still solvent—in fact I felt that I knew I was, and most of these instances that I have referred to occurred immediately after that.

I remember Mr. Chapman. Like the rest, he came in and said he wanted some interest on his money and he told me to loan it, which I did.

And Mr. E. E. Haines, I remember him. He told me to take his money and do the best I could for him, he wanted some interest—he did not want it lying idle.

And Mrs. DeWar—she told me the same thing.

The Kelsay note of date November 6, 1909, is mine. Mr. Kelsay and I had some eight or ten thousand head of sheep as well as land in eastern Oregon. He was supposed to put in half the money and I the other half. A severe winter came on and a freeze, and we lost about four thousand head—I think perhaps more. Mr. Kelsay always told me that anything I did in his name was always satisfactory—would be satisfactory to him.

(Testimony of Thomas R. Sheridan.)

I remember Joseph Mosthaf. That loan occurred in February, 1911, for \$800. He had a water and light bond and after that was paid he told me that he wanted to put the money out again, and told me to take it and dispose of it as I saw proper; that is to keep it, and I did as he authorized me to, and put in a memorandum check and a note in the vault just the same. His name being Mosthaf, I put his note in the pigeon hole in the vault lettered "M".

In regard to Government's Exhibit Number 74, that is the instrument I executed. The memorandum check passed through the usual channel into the bookkeeper and there written up and afterwards sent to the depositor. These memorandum checks and all of them were treated precisely the same as the check drawn by the party himself, as to its being returned to the party when the book was balanced.

I remember Mr. William Wende. I have done his business for a long time, and have handled all his business. He did not pretend to do any of it; he usually came to the bank with his small check and had it made out and cashed; I used his \$1010 at his request; he requested me to use it and I did. This was before I had used it.

In regard to Mr. Agee, I have to say that many years ago Mr. Agee was in a very critical circumstance—in fact he would have lost his property, and he told me so unless I came to his assistance, and he induced me to take a half interest in a fruit orchard that he had

(Testimony of Thomas R. Sheridan.)

south of town about eight miles; after I did so Mr. Agee said that he was not any man in finances and that he would run the farm if I provided the necessary funds to carry on the business, and that if it was necessary at any time to have any money that I was perfectly at liberty to use his name. I transferred the money to his account.

In regard to Mrs. Byron, I have not seen those papers since June, 1911; if the note is not in the papers it has been taken since that time because I put every note that I made out in an envelope and put it as I said before, alphabetically. I put hers in the letter "B".

In regard to the memorandum check, it was executed by me and is my impression that I gave a note for the amount. Mrs. Byron came in with the money—\$2000, at one time, and I was in the bank, and I thought that she wanted to do business with the bank, and she said, "No, I don't want to do business with the bank; I want to do business with you; I don't know anything about the bank." And we went back into the back part of the bank and she had in her handkerchief \$2000 in gold; she said, "There it is, count it. I want you to take that and keep it for me, and anything you do with it will be satisfactory to me." I do not remember that anything was said about interest but I imagine she would expect interest.

In regard to the letters, Defendant's Exhibits 21, 22, and 23, these are all letters that I received through the mail from Mrs. Byron. After my financial trouble

(Testimony of Thomas R. Sheridan.)

I did not have a dollar. I turned over everything I had and made a general assignment for the benefit of all my creditors. I did not go voluntarily into bankruptcy but was willing to stand on my assignment and pay what I could. I turned over every dollar that I had that I knew of, and this left me without any money at all. I had to borrow twenty-five dollars to come up on the boat here. I have not been able to employ counsel, but my friends are employing my counsel for me.

CROSS EXAMINATION BY MR. REAMES.

Witness continuing:

The First National Bank was organized in 1891, and from 1891 up to the time that it went into voluntary liquidation I remained its president all that time.

I do not think that Mr. Hill ever brought the so-called Goodheart release to me or handed it to me. I do not know how many of these transactions there are where I have written up these memorandum checks and the amount remains unpaid. I could not tell you approximately. I could not tell you within ten or fifteen thousand dollars. I have not had access to them since June, 1911; I could give you no approximation at all. I could not tell you how many notes there are to which I signed the name of A. M. Kelsay; I could not tell you how much Mr. Kelsay is supposed to owe on account of those transactions—the documents would be the best proof. I could not tell you how many notes I signed for Mr. Agee.

THE GOVERNMENT ADMITTED THAT THE GENERAL REPUTATION OF THE DEFENDANT IN ROSEBURG AND IN DOUGLAS COUNTY FOR HONESTY AND INTEGRITY WAS GOOD.

Whereupon the defendant rested.

Whereupon the Government rested.

The above and foregoing (including therein also all exhibits, which are by that certain stipulation of the parties, and order of the Court hereinafter recited, transmitted in the original and certified copies thereof to the Circuit Court of Appeals from the Ninth Circuit, and by said stipulation and order made a part hereof in all respects as though incorporated at large herein), contains all of the evidence of any and every character given upon the entire trial of this cause, and all of the proceedings thus far had upon said trial.

There was no other evidence introduced at said trial other than that hereinbefore set forth, with the exception of said exhibits.

Within the time limited by the rule of the Court so to do, the defendant filed with the Court in writing the following proposed instructions, with the request that the same be given on behalf of said defendant as a part of the charge of the Court to the jury:

I.

Gentlemen of the Jury, as to Count One of this indictment I direct you to return a verdict of "not guilty."

II.

The defendant requests a like instruction to the above as to each count of the indictment.

III.

If the Court shall decline to direct a verdict in favor of the defendant, as to each count, then the defendant requests the court to give the instructions hereto attached.

I.

It is charged in the first count of the indictment that the defendant, being president of the First National Bank of Roseburg, Oregon, on the 7th day of March, 1911, willfully and unlawfully abstracted and converted and caused to be abstracted and converted to his own use, benefit and advantage and to the use, benefit and advantage of one B. C. Agee, certain moneys, funds and credits of the said bank, of the amount and value of \$230.00, which sum so abstracted, it is alleged, was held by the said National Bank as a deposit for the sole use and benefit of one David Hull, and it is alleged in the indictment that said sum was so abstracted without the knowledge or consent of the said banking association and with the intent on the part of the de-

fendant to injure and defraud the said association and the said depositor.

In Count Two of the indictment it is alleged that the defendant, being president of the said national banking association, on the 22d day of March, 1911, willfully and unlawfully abstracted and converted and caused to be abstracted and converted to his own use, benefit and advantage and to the use, benefit and advantage of one W. P. Reed certain moneys, funds and credits of said banking association of the amount and value of \$530.00, out of moneys, funds and credits of said banking association held by it as a deposit for the sole use and benefit of one M. S. Doerstler, a depositor and creditor of said bank, and it is alleged that such abstraction and conversion was without the knowledge and consent of the said association and with the intent on the part of the defendant to injure and defraud the said banking association and the said M. S. Doerstler.

The other six counts of the indictment charge in like manner the abstraction by the defendant of certain specified sums out of moneys held by the bank for certain named depositors. In each of the other counts, however, it is alleged that the abstraction was for the sole use and benefit of the defendant.

II.

Before you can find the defendant guilty on any count of this indictment it will be necessary for each and every juror to be satisfied beyond a reasonable

doubt of two things; first, that the defendant took and converted to his own use, benefit or advantage, or to the use, benefit or advantage of some other person, the amount named in the indictment or some portion thereof, and second, that in so taking and converting such sum he acted with intent to injure and defraud either the bank or the depositor named.

III.

In each count it is charged that the money alleged to have been taken by the defendant was held by the bank as a deposit for a named depositor of the bank, hence if you find that the defendant was authorized by such depositor in any case named in the indictment to take and use the money by such depositor deposited, and that then the defendant took the money pursuant to such arrangement, then of course you should find the defendant not guilty on that charge, for the depositor had a right to authorize the defendant to take and use his, the depositor's money, in any way he saw fit.

IV.

If you find that as respects the amount alleged to have been taken and converted by the defendant in any particular count of this indictment, the defendant took the same or any thereof and converted it to his own use or to the use of any other person, you will first inquire whether or not he had the authority of the depositor from whose account the same was taken to take and use the same, and if you find that he had such

authority, then you should find the defendant not guilty under that count; or if you have a reasonable doubt as to whether or not the defendant so took and converted such sum without the authority of the depositor, then you should find the defendant not guilty under that count.

V.

If, in considering any particular count of the indictment, you find beyond a reasonable doubt that the defendant did not have authority to take and use the money or any portion thereof charged to have been taken by him, but find that he did take and use the same in good faith, believing that he had authority so to do, or if you entertain a reasonable doubt as to whether or not he in good faith believed he had authority to take and use the same, then you should find the defendant not guilty. In other words, in order to find the defendant guilty, you must find beyond a reasonable doubt that he not only took and appropriated to his own use or to the use of another the money, or some thereof, charged in the particular count to have been taken and appropriated by him, without authority of the depositor, but you must also find and be satisfied beyond a reasonable doubt that in taking and appropriating the same he acted with intent to injure or defraud the bank or the depositor. If, therefore, you find, that although the defendant took and appropriated to his own use or to the use of another any particular sum held on deposit by the bank without the authority of the bank or without the authority of

the depositor, but find that he honestly believed he had the authority of the depositor so to do, and that, so believing, he took and appropriated the same, or if you have a reasonable doubt as to that, you should find the defendant not guilty.

VI.

There is some testimony on the part of the prosecution tending to show that in some instances a depositor authorized the defendant to take his or her money then on deposit in the bank and loan it on good security and that defendant thereupon took the money and used it himself, placing his personal note in the bank for it. The defendant, however, contends that in all such cases the depositor authorized him to use the money himself, if he desired to do so. I instruct you, however, that so far as this case is concerned, if you find that as to any sum of money mentioned in any count of the indictment the defendant was authorized to take the same, but instructed to loan it on security only and that he thereupon took the money and used it himself, you cannot find him guilty for so doing, for in such case he had authority to withdraw the money from the bank and if, after withdrawing it, he did not loan it as directed but used it himself, he did not thereby violate the statute under which he is being prosecuted here.

Whereupon, the court gave to the jury the following instructions:

GENTLEMEN OF THE JURY: You have listened patiently to the testimony and arguments of

counsel in this case during the past week and it now becomes my duty to lay down a few general rules of law to guide you in your deliberations. When I have done this the responsibility of the Court for the conduct of this trial will end and yours will begin.

Section 5209 of the Revised Statutes of the United States, so far as material to your present inquiry, reads as follows: "Every president of any association" (meaning, of course, a National Banking Association), "who abstracts any of the moneys, funds or credits of the association with intent to injure or defraud the association or any other company, body politic or corporate, or any individual person, shall be deemed guilty of a misdemeanor and shall be punished as therein provided." The indictment in this case charges eight separate and distinct violations of this section in as many different counts.

The first count charges that Thomas R. Sheridan, the above named defendant, heretofore, to-wit: on the 7th day of March, 1911, in the county of Douglas, within the State and District of Oregon and within the jurisdiction of this Court, was then and there President of a certain National Banking Association, to-wit: the First National Bank of Roseburg, Oregon, theretofore duly organized and established and then and there existing and doing business at the city of Roseburg in the county of Douglas, within the State and District of Oregon, District aforesaid, under the laws of the United States, and that he, the said Thomas R. Sheridan, so then and there on the date last above mentioned being

such President did then and there at the said city of Roseburg, County of Douglas, in the State and District of Oregon, on, to-wit: the 7th day of March, 1911, willfully and unlawfully abstract and convert, and cause to be abstracted and converted to his, the said Thomas R. Sheridan's own use, benefit and advantage, and to the use, benefit and advantage of one B. C. Agee, certain moneys, funds and credits of said National Banking Association, of the amount and value of \$230.00, a more particular description of which is to this Grand Jury unknown, from and out of the moneys, funds and credits of said National Banking Association held by the said National Banking Association as a deposit for the sole use and benefit of one David Hull, a depositor and creditor of said First National Bank of Roseburg, by means of a certain instrument designated as a memorandum check, without the knowledge and consent of said National Banking Association, and with the intent then and there on the part of him, the said Thomas R. Sheridan, to injure and defraud the said National Banking Association and said depositor and creditor therein."

The seven remaining counts are in all respects similar to the first, except as to the date of the abstraction, the amount abstracted, the name of the depositor and the person to whose use, benefit and advantage the moneys were appropriated.

This indictment, gentlemen of the jury, is but the formal accusation presented against the defendant by the Grand Jury. It is no evidence of his guilt and

you must indulge in no presumption against him simply by reason of the fact that he has been indicted.

To the several counts of the indictment the defendant has interposed his plea of not guilty. This plea places at issue every material averment of the indictment and casts upon the Government the burden of proving every such averment to your satisfaction and beyond a reasonable doubt.

A reasonable doubt, in this connection, is such a doubt as will cause a reasonable, prudent and considerate man to hesitate or waver in the gravest and most vital concerns of human life before acting on the truth of the matter charged or alleged. This doubt may arise from the evidence or from the lack of evidence. On the one hand you will not be swayed by doubts which are purely imaginary, capricious or speculative; on the other hand you must not convict in the face of doubts which are real and substantial. If from a fair and candid consideration of all the testimony you can say upon your oaths as jurors that you have an abiding conviction to a moral certainty of the truth of the charge, then you have no reasonable doubt and should convict; if, on the other hand, you have no such moral convictions, if you have a doubt for which a substantial reason can be given you must give the defendant the benefit of that doubt and find him not guilty.

I further charge you that this rule of reasonable doubt applies to each and every one of you, and so long as any juror entertains a reasonable doubt as to the

guilt of the defendant it is his sworn duty to vote not guilty. I do not mean by this that you should be arbitrary or unyielding, for it is your duty to compromise your differences as best you can; but if, after a full consideration and discussion of all the testimony, you still entertain a reasonable doubt as to the guilt of the defendant, you must vote not guilty so long as such doubt remains.

I further instruct you at this time that every man accused of a violation of the law is presumed to be innocent of the crime charged until his guilt is established to the satisfaction of the jury, to the exclusion of every reasonable doubt. This presumption of innocence is not a mere fiction which you may disregard at pleasure; it is a substantial part of the law of the land; it accompanies the defendant throughout the trial and abides with him until its last vestige is removed by the evidence on the part of the Government and until you are satisfied of his guilt beyond a reasonable doubt, notwithstanding the presumption of innocence with which the law surrounds him.

There are two elements in the crime here charged, gentlemen of the jury, or at least two principal elements: One is the abstraction of the funds of a national bank and the other is the intention with which the funds were so abstracted. I will define the word "abstract," in the language of the Supreme Court of the United States: "The word 'abstract' as used in the statute has but one meaning, being that which is attached to it in its ordinary and popular use. It means to take

or withdraw from, so that to abstract the funds of a bank, or a portion of them, is to take and withdraw from the possession and control of the bank, the moneys and funds alleged to be abstracted. To constitute this offense within the meaning of the act it is necessary that the moneys and funds shall be abstracted from the bank without its knowledge and consent, with the intent to injure or defraud it or some other company or person, or to deceive some officer of the association or an agent appointed to examine its affairs."

I might add here that there is no charge in this indictment that the abstraction was made for the purpose of deceiving any officer of the association or any agent appointed to examine its affairs.

It is conceded in this case, gentlemen of the jury, that the First National Bank of Roseburg was an association organized and existing under the laws of the United States during all the times mentioned in this indictment; it is likewise conceded that the defendant Thomas R. Sheridan was the president of that association during all the times mentioned in the indictment and for many years prior thereto; it is likewise conceded that the defendant Thomas R. Sheridan withdraw from the bank the several sums of money belonging to the several depositors as set forth in the indictment by means of certain memorandum checks received in evidence.

The principal question for your consideration will be—or at least the first question for your consideration will be: Was the defendant authorized by the depos-

itors to withdraw these moneys? If you find from the testimony in this case that he was so authorized or if you find from the course of dealing between the defendant and the depositor that the defendant had reasonable cause to believe and on good faith did believe that he was so authorized, then he is not guilty of the crime here charged. But if you are satisfied beyond a reasonable doubt that he had no authority from the depositor to withdraw the funds, and if you further find that he had no reasonable cause to believe and did not in good faith believe that he had such authority, then his abstraction of the funds was wrongful, and the crime is complete if you find that the abstraction was made with the intent to injure or defraud either the banking association or the depositor.

This, gentlemen of the jury, is the proper place to limit the scope and effect of certain testimony which the Court received during the trial. You will recall that the Court admitted testimony relating to transactions between the defendant and other depositors of a similar nature to those set forth in the indictment. This testimony was not offered for the purpose of proving authority or a want of authority for the issuance of the particular checks set forth in the indictment. You cannot prove that a man had authority to draw a check for one depositor by proving that he had authority to draw a check for another depositor at another and different time. The converse of this is equally true. You cannot prove that a man had no authority to withdraw funds from a bank in behalf of one depositor by proving that at another and different time he withdrew funds

from the bank belonging to another depositor without authority. So that the testimony as to these transactions outside of those particular transactions set forth in the indictment must not be considered by you in determining the question of want of authority at all. You will not consider this testimony until after you have settled in your own minds beyond a reasonable doubt that the funds mentioned in the indictment were withdrawn from the bank by the defendant without authority from the depositor, real or apparent, as I have defined these terms to you.

If you find beyond a reasonable doubt that the defendant abstracted these funds wrongfully, as I have defined that term to you, the next question for you to determine will be: Were they so abstracted with the intent to injure or defraud either the association or the depositor?

To defraud implies and includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust and confidence generally reposed, and which are injurious to another, or by which an undue and unconscionable advantage is taken of another.

On the question of fraudulent intent I charge you that it is an axiom of the law that every sane man is presumed to intend the natural or necessary consequences of his voluntary acts, and this presumption will usually prevail unless from a consideration of all the circumstances the jury entertain a reasonable doubt whether the intent did in fact exist.

In directing that these offenses, or the acts which constitute them, must be committed with intent to injure or defraud the bank, the statute does not intend it shall be made to appear that the defendant had either malice or ill will towards the association or towards the depositors. This term, namely: "With intent to injure and defraud," means nothing more than that general intent to injure or defraud which always arises in contemplation of law when one willfully or intentionally does that which is illegal or fraudulent and which in its necessary and natural consequences must injure another. So that, while the offense of abstraction without authority must be committed by the defendant with intent to injure or defraud either the association or the depositor, that intent may be shown or may be presumed from the doing of the wrongful, fraudulent and illegal acts which in their necessary results naturally produce loss or injury, either to the association or to the depositor.

The law presumes that every man intends the legitimate consequences of his acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The intent to injure or defraud is presumed when the unlawful act which results in loss or injury is proven to have been knowingly committed.

If, therefore, you find from the evidence beyond a reasonable doubt that the defendant, Thomas R. Sheridan, without having previously secured the authority of the depositors so to do, or without apparent authority

as I have defined that term to you, willfully abstracted the funds of the bank then held in said bank to the credit of said depositors in manner and form as alleged in the indictment, and converted said funds to his own use and benefit, the intent to injure and defraud both the bank and the said depositors may be by you presumed. Acts which involve such consequences, when knowingly and wrongfully committed, established not only the guilty intent to injure and defraud mentioned in the statute, but they disclose moral turpitude utterly inconsistent with an innocent intent.

It is presumed that every person intends the natural and ordinary consequences of his own acts. Applying this rule to the case at bar, if you should find from the evidence beyond a reasonable doubt that the defendant without authority took from the accounts of his depositors named in the indictment, without previous authorization from them, their money and converted the same to his own use and benefit, and thereby placed the same beyond the control of said depositors, you would be justified then in presuming that he did these acts with intent to injure and defraud said depositors.

Again, as observed by the Supreme Court of the United States experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law permits a resort to circumstances as a means of ascertaining the truth. And in such cases great latitude is allowed by law to the acceptance of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the

purpose of remedying the want of direct evidence, but also to supply protection against imposition. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, corroborated by minor coincidences, be sufficient to constitute conclusive proof, and where fraud is the question at issue evidence of frauds of like character committed by the same parties at or near the same time is admissible. Its admissibility is placed on the ground that where transactions of a similar character executed by the same parties are closely connected in point of time, the inference is reasonable that they proceeded from the same motive. The case of fraud as here stated is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge.

But, gentlemen of the jury, while the fraudulent intent may be proved by either direct or circumstantial evidence, it must nevertheless be established to your satisfaction and beyond a reasonable doubt before you can return a verdict of guilty. And where the Government relies on circumstantial evidence to establish the fraudulent intent the circumstances themselves must be proved to the satisfaction of the jury and beyond a reasonable doubt, and when so proved they must not only be con-

sistent with the guilt of the defendant, but they must be inconsistent with any other rational hypothesis. In other words, gentlemen of the jury, if you can reconcile the testimony in this case on any reasonable theory consistent with the innocence of the defendant it is your duty to do so.

A number of reputable witnesses have testified that for many years last past the reputation of the defendant for honesty and integrity in the community in which he has resided during that period has been good, and I might add here that that fact is conceded by the Government. This testimony is evidence in favor of the defendant and is before you for your consideration in connection with the other evidence in the case. In all cases in which a person accused of a crime, involving dishonesty and want of integrity, is on trial, his good reputation for honesty and integrity, is properly to be submitted to the jury. The purpose of such testimony is to enable the jury to determine the degree of improbability that the person on trial, who possesses such a reputation, would have committed such a crime. What weight is to be given to the good reputation of the defendant rests solely with the jury. The circumstances in one case may be such that an established reputation for honesty and integrity on the part of the defendant would create a reasonable doubt as to his guilt, although without such reputation the evidence in the case would be convincing and justify a verdict of guilty. In another case the circumstances may be such as would require a verdict of guilty, notwithstanding an established reputation for integrity on the part of the defendant.

It does not necessarily follow from the fact that a man has a good reputation for honesty and integrity that he actually possesses those traits of character and the mere possession of such a reputation does not render the person possessing it incapable of committing a crime involving dishonesty and a want of integrity. It is within the common knowledge of mankind that many persons bearing a good reputation have nevertheless been guilty of crime. While the reputation of the defendant for honesty and integrity is for your consideration as part of the evidence in the case, it is entitled to just the weight—no less and no more—which you, upon a review of all the evidence in the case and in the exercise of a sound judgment, shall attach to it.

You, gentlemen of the jury, are the sole judges of the facts in this case and of the credibility of the witnesses. Before reaching a verdict you will carefully consider and compare all the testimony, you will observe the demeanor of the witnesses on the stand as they appeared before you; you will take into consideration their interest in the result of your verdict, if any such interest is shown; their knowledge of the facts in relation to which they have testified; the probability of the truth of their testimony; their bias or prejudice, or the absence of either of these qualities; any motives that may lie back of their testimony, and all the facts and circumstances given in evidence or surrounding the witnesses on the trial.

I further charge you, gentlemen of the jury, that if you find that any witness has willfully testified false-

ly to any material fact before you, or if any witness has been successfully impeached, you are at liberty to disregard the testimony of that witness entirely except in so far as he or she may be corroborated by other credible testimony or by other known facts in the case.

Congress has passed stringent laws for the protection of deposits in national banks, and it is the duty of courts and juries to enforce these laws whenever and wherever violated, and if you are satisfied in this case beyond a reasonable doubt that this defendant has violated these laws in manner and form as charged in the indictment you will not hesitate to so find by your verdict. If on the other hand, you entertain a reasonable doubt as to his guilt, no higher or more solemn duty can rest upon you than to return a verdict of not guilty.

The Government of the United States insists on obedience to its laws, but it demands no victims; it asks equal and exact justice at your hands and nothing more—justice for itself and justice for the citizen accused of violating its laws.

MR. FULTON: I except to the Court's refusal to give defendant's requested instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, and I also except to the Court's refusal to give those instructions in the manner and form requested. I take an exception to the refusal of the Court to instruct the jury to return a verdict for the defendant on the ground that sufficient evidence in law of intent to defraud on the part of the defendant

has not been introduced in this case, and as that is an essential element of the crimes charged that therefore the jury would not be justified in returning a verdict against the defendant on any or all of the counts in this indictment. I except to the Court's refusal to instruct the jury to return a verdict in favor of the defendant on the ground that sufficient evidence in law that defendant did not have authority to withdraw or abstract the money deposited in the bank of which he was the president, in the manner and by the method which the uncontradicted evidence in this case shows was employed by him, has not been introduced in this case.

I ask the Court at this time to instruct the jury that sufficient evidence in law has not been introduced in this case to justify them in finding that defendant withdrew or abstracted money belonging to any of the depositors who have testified as witnesses in this case, on the ground that when a depositor deposits money in a national bank as the depositors testifying in this case have done the money so deposited ceases to be the money of the depositor and becomes the bank's money, and that there is merely a creditor and debtor relation between the depositor and the bank, and therefore that the money withdrawn or abstracted by the defendant was money belonging to the bank.

THE COURT: The instruction requested is refused.

MR. FULTON: I save an exception, if the Court please. I ask the Court at this time to instruct the jury that the indictment in this case charges the defend-

ant with having abstracted moneys, funds and credits of the First National Bank of Roseburg, Oregon, and that therefore, if the jury find that the moneys, funds, or credits abstracted by the defendant as shown by the evidence in this case were moneys, funds or credits of the depositors who have testified in this case, the jury should find the defendant not guilty.

THE COURT: I refuse to so instruct the jury.

MR. FULTON: I save an exception, if the Court please. I also particularly except to the Court's refusal to instruct the jury in accordance with defendant's requested instruction No. 5, that an officer of a National Bank who has full charge of making loans on behalf of the bank has a right to lend any portion or all of the money deposited in the bank by depositors on general checking accounts without first obtaining permission from the depositor or depositors to do so. I except to the Court's failure to instruct the jury that sufficient evidence in law has not been introduced in this case to justify the jury in finding that any of the depositors who have testified in this case have been defrauded by the acts of defendant.

Thereupon the jury retired to deliberate upon a verdict, and thereafter returned into Court their verdict finding the defendant guilty as charged upon Counts One (1) and Four (4) of said indictment. Said verdict having been recorded by the clerk and read to the jury who confirmed the same, the Court thereupon discharged the jury from further consideration of this cause.

And the Court having duly set a day for pronouncing sentence upon the defendant, said defendant before sentence was pronounced upon him presented to the Court a motion in arrest of judgment and a motion for a new trial herein; and the aforesaid motion in arrest of judgment and motion for a new trial herein having been argued by counsel for the defendant and for the plaintiff, respectively, the Court denied said motions, and, thereupon, rendered its judgment and sentence upon the defendant, and made its order granting to said defendant thirty days within which to prepare and serve upon the plaintiff a draft of his proposed bill of exceptions upon writ of error herein, which time was thereafter extended by successive stipulations of the parties and orders of the Court to and including the 10th day of October, 1915.

Within the time allowed by stipulation of the parties and the order of this Court the bill of exceptions has been presented, filed and served and is now by the stipulation of the parties and order of this Court settled and allowed as the bill of exceptions in this case.

Concerning the embodiment of exhibits in and as a part of this Bill of Exceptions, the respective parties hereto have stipulated and the Court has made its order as follows, to-wit:

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

THOMAS R. SHERIDAN, *Defendant.*

Stipulation and Order Transmitting all Exhibits and the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit and making the same a part of the bill of exceptions without incorporation at large therein.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that all United States' exhibits and all defendant's exhibits introduced in evidence and on file in the above-entitled cause may be transmitted in the original by the Clerk of the above-entitled Court to the Circuit Court of Appeals for the Ninth Circuit, and that said exhibits may be included as and deemed a part of the Bill of Exceptions upon Writ of Error herein, with the same effect in all respects as though incorporated at large in said Bill of Exceptions.

As to those Exhibits which have been heretofore withdrawn, certified copies shall be transmitted in lieu

of the originals, to have the same force and effect as the originals.

Dated this 19th day of October, 1915.

Clarence L. Reames.

United States Attorney for Oregon.

J. L. McNab,

Attorney for Defendant.

Now, on this day, for good cause shown and pursuant to the above and foregoing stipulation, the Clerk of the above-entitled Court is hereby directed and ordered to transmit all of the United States' exhibits and all of the defendant's exhibits introduced in evidence and on file in the above-entitled cause, in the original, to the United States Circuit Court of Appeals for the Ninth Circuit; and

IT IS HEREBY ORDERED that said exhibits shall be included as and deemed a part of the Bill of Exceptions upon Writ of Error herein with the same effect in all respects as though incorporated at large in said Bill of Exceptions.

IT IS FURTHER ORDERED that in those instances where exhibits have been withdrawn, that the certified copies thereof be transmitted, the same to have the same effect as the originals.

Dated this 19th day of October, 1915.

Frank H. Rudkin,

United States District Judge.

*In the District Court of the United States, for the
District of Oregon.*

UNITED STATES OF AMERICA, *Plaintiff,*

VS.

THOMAS R. SHERIDAN, *Defendant.*

STIPULATION RE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the above and foregoing Proposed Bill of Exceptions upon Wirt of Error herein has been presented within the time allowed by law and the rules and orders of this Court duly and regularly made in this behalf, and that the same is in proper form and conforms to the truth, and that it may be settled, allowed, signed and authenticated by this Court as the true Bill of Exceptions herein, and that it may be made a part of the record in this cause.

Dated this 19th day of October, 1915.

Clarence L. Reames,
United States Attorney.

J. L. McNab,
Attorney for Defendant.

*In the District Court of the United States, for the
District of Oregon.*

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

THOMAS R. SHERIDAN, *Defendant.*

The above and foregoing Bill of Exceptions, duly proposed by the defendant, Thomas R. Sheridan, and duly agreed upon by the respective parties hereto, having been presented to the Court within the time allowed and required by law and by the rules and orders of this Court duly and regularly made in that behalf, is hereby settled, allowed, signed and authenticated as in proper form and as conforming to the truth and as the true Bill of Exceptions herein, and is hereby made a part of the record in this cause.

Dated this 19th day of October, 1915.

Frank H. Rudkin,
Judge of the District Court
of the United States for the
District of Oregon.

Filed October 25, 1915.—G. H. Marsh, Clerk.

AND AFTERWARD, to-wit: on the 25th day of October, 1915, there was duly filed in said Court and cause, a Petition for Writ of Error, in words and figures as follows, to-wit:

PETITION FOR WRIT OF ERROR.

Now comes Thomas R. Sheridan, defendant in the above-entitled cause, and brings this his Petition for a Writ of Error to the District Court of the United States for the District of Oregon, and respectfully shows:

That on the 30th day of April, 1915, there was rendered and entered in the above-entitled court a judgment and sentence against him, the above-named defendant, whereby said defendant was adjudged and sentenced to be imprisoned for the term of five (5) years in the United States Penitentiary at McNeil's Island, State of Washington, in which judgment and sentence against said defendant, and in the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of said defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this Petition.

WHEREFORE, said above-named defendant prays that a Writ of Error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be

sent to the said Circuit Court of Appeals, and that all further proceedings in the above-entitled District Court be suspended, stayed, and superseded, and that sentence and execution herein be stayed until the final disposition of said Writ of Errors in said United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 19th, 1915.

J. L. McNab,
Attorney for Defendant,
Thomas R. Sheridan.

Due service of the within is hereby admitted this 25th day of October, 1915.

Clarence L. Reames,
United States Attorney.

Filed October 25, 1915.—G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit: on the 25th day of October, 1915, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

Thomas R. Sheridan, defendant in the above-entitled action, and plaintiff in error herein, having petitioned for an order from said Court permitting him to procure a Writ of Error from this Court directed from the United States Circuit Court of Appeals for the Ninth

Circuit from the judgment and sentence made and entered in said cause, against said plaintiff in error, and petitioner herein, now makes and files with his said petition the following assignment of errors herein upon which he will rely for a reversal of said judgment and sentence upon the said writ, and which said errors, and each and every of them, are to the great detriment, injury and prejudice of the said defendants and in violation of the rights conferred upon him by law; and he says that in the record and proceedings in the above-entitled cause upon the hearing and determination thereof in the District Court of the United States for the District of Oregon there are manifest errors in this, to-wit:

I.

The Court erred in charging the jury as follows:

“The principal question for your consideration will be—or at least the first question for your consideration will be: Was the defendant authorized by the depositors to withdraw these moneys? If you find from the testimony in this case that he was so authorized, or if you find from the course of dealing between the defendant and the depositor that the defendant had reasonable cause to believe and on good faith did believe that he was so authorized, then he is not guilty of the crime here charged. But if you are satisfied beyond a reasonable doubt that he had no authority from the depositor to withdraw the funds, and if you further find that he had no reasonable cause to believe and did not in good faith believe that he had such authority, then

his abstraction of the funds was wrongful, and the crime is complete if you find that the abstraction was made with the intent to injure or defraud either the banking association or the depositor."

The defendant excepted to the action of the Court in giving the above instruction to the jury, for the reason that the uncontradicted evidence introduced in this cause was that the accounts of all the depositors who testified in this cause were general checking accounts, that therefore there was merely a debtor and creditor relation between the bank and the depositor, that the defendant had exclusive authority to make loans for the bank, and consequently was not required to obtain authority from the depositors before withdrawing or abstracting any money so deposited from the bank for the purpose of making loans. Said exception was duly allowed by the Court.

II.

The Court erred in overruling the demurrer of said defendant to the indictment herein, and to each and every, all and singular, of the counts thereof, for the reason that the matters therein contained, in the manner and form as the same are stated and set forth in said indictment, were not sufficient in law, and that the said defendant was not bound by the law to answer the same, because it is not charged in said indictment, or in any of the counts thereof, by whom the "certain instrument designated as a memorandum check" was drawn, and that therefore it is to be presumed that said

memorandum check was drawn by the depositor and not by the defendant.

To which ruling of the Court said defendant then and there duly and regularly excepted.

III.

The Court erred in overruling the objection of the defendant to the introduction of any evidence under the indictment, said objection having been made upon the ground that said indictment failed to state an offense under Section 5209 of the Revised Statutes of the United States, or under the penal code of the United States, or any offense whatever.

To which ruling of the Court said defendant then and there duly and regularly excepted.

IV.

The Court erred in overruling the demurrer of said defendant to the indictment herein, for the reason that said indictment was insufficient in law.

To which ruling of the Court said defendant then and there duly and regularly excepted.

V.

The Court erred in denying the motion of defendant that the Court withdraw from the jury all testimony that had been given by the witness David Hull concerning the \$800 memorandum check and promissory note,

for the reason that said testimony had no relation to the matters charged in the indictment.

To which ruling of the Court said defendant then and there duly and regularly excepted.

Said testimony so asked to be withdrawn was as follows:

Direct examination of David Hull: I never signed this memorandum check dated December 23, 1913, for \$800 and purporting to be signed by me, but I got a note for it signed by Mr. Sheridan. (The Government requested that the check be marked Government's Exhibit 3 for identification and the check was so marked.) I first learned of this \$800 transaction about a year or a year and a half ago. I put it in lawyer Eddy's hands. I didn't know anything about any notes at all, anything in the bank. Mr. Eddy found out that the notes were in the bank. \$460 of that loan was paid, besides the interest; of course the interest was paid, you know, part of it. I have the note of John Sheridan. He paid \$460.00 on the note. My lawyer got the note from the bank. It is signed John Sheridan, by Tom Sheridan. \$400 was paid on it, and \$160 interest.

VI.

The Court erred in overruling the objection of the defendant to the following question put to the Government's witness, S. A. Sanford, on his direct examination:

MR. REAMES: Q. Now, then, prior to the time of that credit of \$230 in the account of Mr. B. C. Agee, what was the condition of Mr. Agee's account?

MR. FULTON: I object to that, because whether the account was in overdraft or not does not in any manner that I can conceive of tend to throw any light upon whether or not he had the authority to take the money.

THE COURT: Answer the question. Objection overruled.

MR. FULTON: Exception.

THE WITNESS: A. The account was overdraft \$229.67 on the day immediately prior to the credit.

VII.

The Court erred in overruling the objection of the defendant to the following questions put to the Government's witness, S. A. Sanford, on his direct examination:

MR. REAMES: Q. Now turn to the individual ledger at page 600; is that the account of David Hull?

A. Yes, sir.

Q. Now, I hand you herewith a memorandum check, Government's Exhibit No. 3, for identification, and will ask you to examine the same and say in whose handwriting that is.

A. The handwriting of Mr. Sheridan.

MR. FULTON: That is that one regarding the \$800 transaction?

MR. REAMES: That is the J. T. Sheridan transaction.

MR. FULTON: On that ground and the reasons already stated to Your Honor we base our objection, we object to that and wish to save an exception.

THE COURT: Yes.

VIII.

The Court erred in overruling the objection of the defendant to the following questions put to the Government's witness, S. A. Sanford, on his direct examination:

Q. Now, look under date of December 23, 1909, and read the item that appears there.

A. December 23.

Q. 1909?

A. 1909. David Hull's account was charged there with \$800.

Q. With \$800. Now, what did that charge of \$800 do to David Hull's account?

A. Overdrew his account, I notice.

MR. FULTON: We wish the same objection to all of that.

THE COURT: The same ruling.

MR. FULTON: I wish to save an exception.

Q. What did it do to that?

A. Overdrew it, \$263.50.

IX.

The Court erred in sustaining the objection of the Government to the following question put to the Government's witness B. C. Agee on his cross-examination:

Q. And if he had told you just about the note, why it would have been all right; you would have considered it all right, wouldn't you?

The Government's objection to the above question was sustained, whereupon defendant then and there duly and regularly excepted to said action of the Court.

X.

The court erred in sustaining the objection of the Government to the following question put to the Government's witness B. C. Agee on his cross-examination:

Q. Now, Mr. Agee, I ask you if you haven't—I don't remember the names of the persons, but if you haven't said to many people in Roseburg many times since this occurred that whatever Mr. Sheridan did in respect of using your name in that matter was with your authority, he had a right to do so in transacting the business?

The Government's objection to the above question was sustained by the Court, to which ruling the defendant then and there duly and regularly excepted.

XI.

The Court erred in overruling the objection of the defendant to the following question put to the Government's witness W. E. Chapman on his direct examination:

Q. What conversation, if any, did you have with Mr. Sheridan about loaning your money?

The defendant objected to the question on the ground that the witness was not one named in the indictment and the subject-matter of the question had no relation to any of the matters contained in the indictment, which said objection was overruled by the Court, to which action of the Court the defendant then and there duly and regularly excepted.

The above question was answered as follows: I went in and told Sheridan I would like to have enough money in there to loan and I said, "I will place enough in there to make it even up six hundred dollars." When I first went in I said, "Tom, I would like to loan the money I have in the bank," and I said, "I will put enough in to even up six hundred dollars." And Tom said, "I can loan it for you," and that is all there was said about it. I had a chance after that to loan my money, but I found out that I didn't have any money in the bank. I never signed this memorandum check, Government's Exhibit 17.

XII.

The Court erred in overruling the objection of the defendant to the following question put to the Govern-

ment's witness Moses S. Doerstler on his direct examination:

Q. Now, here is a memorandum check of April 8, 1908, signed M. S. Doerstler, marked draft \$1,000, and a promissory note of the same date, \$1,000, signed T. R. Sheridan, in favor of M. S. Doerstler. I will ask you to look at those and tell the jury when you first saw those—I will say to the Court that this is not one of the indictments, so that your objection may go to this.

The defendant objected to the above question, and the Court overruled the objection; thereupon defendant duly and regularly excepted to said ruling of the Court.

The answer to the above question was:

A. I never seen the note. Of course I didn't know about the memorandum check. I don't know why I should have Mr. Sheridan's note.

XIII.

The Court erred in admitting in evidence, over the objection of the defendant, the document or promissory note marked Government's Exhibit 25; to which action of the Court the defendant then and there duly and regularly excepted.

XIV.

The Court erred in overruling the objection of the defendant to the introduction in evidence of the promissory notes, Government's Exhibits 33 and 35, and to

the following questions put to the Government's witness C. E. Marks on his direct examination:

Q. When did you first see these two notes, Government's Exhibits 33 and 35?

The defendant objected to the above question and the Court overruled the objection; to which ruling of the Court the defendant then and there duly and regularly excepted.

The answer to the above question was: A. I first saw this promissory note about a year and a half after the Douglas National Bank and the First National Bank were consolidated. I first saw this note, Government's Exhibit 35, the same as I seen the other note, Exhibit 33, they were all in the First National Bank a year and a half after they were closed up.

XV.

The Court erred in overruling the objection of the defendant to the introduction in evidence of Government's Exhibits 37 and 38, and to the following questions put to the Government's witness Harry P. Marks on his direct examination:

Q. When did you first see these papers?

To which question the defendant objected and the Court overruled the objection; to which action of the Court the defendant then and there duly and regularly excepted.

The answer to the above question was: I first saw this memorandum check and note after I got them from my father.

XVI.

The Court erred in overruling the objection of the defendant to the introduction in evidence of Government's Exhibits 39 and 40.

To which action of the Court the defendant then and there duly and regularly excepted.

XVII.

The Court erred in overruling the objection of the defendant, on the ground that they did not relate to matters contained in the indictment, to the following questions put to the Government's witness C. J. Marks on his direct examination:

Q. When did you first see this check and note?

Q. Did you sign this release?

The defendant objected to the above questions and the Court overruled the objections; to which action of the Court the defendant then and there duly and regularly excepted.

The answers to the above questions were: I first saw this memorandum check and note after I got them from my father. Yes, I signed this release and knew it wasn't true when I signed it.

XVIII.

The Court erred in overruling the objection of the defendant, on the ground that it did not relate to any of the matters contained in the indictment, to the fol-

lowing question put to the Government's witness Edward C. Marks on his direct examination:

Q. Did you ever authorize Mr. Sheridan to loan your money?

The defendant objected to said question and the Court overruled the objection; to which action of the Court the defendant then and there duly and regularly excepted.

The answer to the above question was:

A. No, I never authorized Mr. Sheridan to loan my money.

XIX.

The Court erred in overruling the objection of the defendant to the following question put to the Government's witness E. E. Haines on his direct examination:

Q. This memorandum check, have you seen it before, it is dated April 6, 1908?

The defendant objected to the above question on the ground that the transaction in which it was involved occurred at too remote a date to permit it to be introduced as a similar offense, and the Court overruled the objection; to which action of the Court the defendant then and there duly and regularly excepted.

The answer to the above question was: No, I have never seen this note before, Government's Exhibit 52.

XX.

The Court erred in overruling the objection of the defendant to the following question put to the Govern-

ment's witness John E. Marks on his direct examination:

Q. Did you ever authorize Mr. Sheridan to loan your money for you?

The defendant objected to the question and the Court overruled the objection, to which action of the Court the defendant then and there duly and regularly excepted.

The answer to the question was: No, I never authorized Mr. Sheridan to loan my money for me, and I never authorized this memorandum check Government's Exhibit 50.

XXI.

The Court erred in charging the jury as follows:

"Where fraud is the question at issue evidence of frauds of like character committed by the same parties at or near the same time is admissible. Its admissibility is placed on the ground that where transactions of a similar character executed by the same parties are closely connected in point of time, the inference is reasonable that they proceeded from the same motive. The case of fraud as here stated is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge."

The defendant excepted to the action of the Court in giving the above instruction to the jury, for the reason that the evidence which the Court permitted to be introduced of similar separate and independent trans-

actions should not be considered by the jury for any purpose in determining the defendant's guilt or innocence of the charges contained in the indictment.

XXII.

The Court erred in charging the jury as follows:

"If, therefore, you find from the evidence beyond a reasonable doubt that the defendant, Thomas R. Sheridan, without having previously secured the authority of the depositors so to do, or without apparent authority as I have defined that term to you, wilfully abstracted the funds of the bank then held in said bank to the credit of said depositors in manner and form as alleged in the indictment, and converted said funds to his own use and benefit, the intent to injure and defraud both the bank and the said depositors may be by you presumed. Acts which involve such consequences, when knowingly and wrongfully committed, establish not only the guilty intent to injure and defraud mentioned in the statute, but they disclose moral turpitude utterly inconsistent with an innocent intent."

The defendant duly excepted to the action of the Court in giving the above instruction to the jury, for the reasons set forth in Assignment of Error No. 1 herein, which said exception was allowed by the Court.

XXIII.

The Court erred in charging the jury as follows:

"It is presumed that every person intends the natural and ordinary consequences of his own acts. Applying

this rule to the case at bar, if you should find from the evidence beyond a reasonable doubt that the defendant without authority took from the accounts of his depositors named in the indictment, *without previous authorization from them*, their money and converted the same to his own use and benefit, and thereby placed the same beyond the control of said depositors, you would be justified then in presuming that he did these acts with intent to injure and defraud said depositors.”

The defendant duly excepted to the action of the Court in giving the above instruction to the jury, for the reasons set forth in Assignment of Error No. 1 herein, which said exception was allowed by the Court.

XXIV.

The Court erred in refusing to give the following instruction No. 1 requested by defendant:

I instruct you, gentlemen of the jury, to return a verdict in favor of the defendant, Thomas R. Sheridan.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XXV.

The Court erred in refusing to give the following instruction No. 2 requested by defendant:

I instruct you to return a verdict for the defendant on the ground that there has not been sufficient evidence

introduced in this case to warrant your finding an intent to defraud on the part of the defendant.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XXVI.

The Court erred in refusing to give the following instruction No. 3 requested by defendant:

I instruct you to return a verdict in favor of the defendant on the ground that there has not been sufficient evidence introduced in this case to support a finding by you that defendant had no authority to lend to himself or persons other than the depositors the money which had been deposited in the bank of which he was the president.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XXVII.

The Court erred in refusing to give the following instruction No. 4 requested by defendant:

I instruct you that the legal relation between the depositors who have testified in this case and the First National Bank of Roseburg, Oregon, was that of debtor and creditor, and if you find that the defendant had sole charge of making loans on behalf of the bank, he

had a right to withdraw for the purpose of making such loans, either to himself or others, the moneys so deposited in the bank.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XXVIII.

The Court erred in refusing to give the following instruction No. 5 requested by defendant:

I instruct you that a person who deposits money in a National Bank, such as the First National Bank of Roseburg, Oregon, was at the times referred to during the hearing of this case, thereby establishes between himself and the bank the relation of debtor and creditor, and the officer or officers of the bank who have charge of making loans on behalf of the bank have a right to lend any portion or all of the money so deposited without first obtaining permission from the depositor to do so.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XXIX.

The Court erred in refusing to give the following instruction No. 6 requested by defendant:

A national bank opening a general checking account with a depositor is not required to keep the moneys so

deposited separate from the other moneys of the bank so that the depositor may withdraw the identical money which he has deposited, but on the contrary the bank may lend such money to third persons or otherwise invest it on behalf of the bank.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XXX.

The Court erred in refusing to give the following instruction No. 7 requested by defendant:

If you find that the defendant had sole power as president to make loans for the First National Bank of Roseburg, Oregon, and had authority to withdraw the funds of the bank for that purpose, the defendant would have a right to withdraw the moneys deposited in that bank by the depositors therein who have testified as witnesses in this case.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XXXI.

The Court erred in refusing to give the following instruction No. 8 requested by defendant:

Authority to withdraw, for the purpose of making loans for the bank, funds or moneys deposited by per-

sons opening general checking accounts in National Banks may legally be vested in the president of the bank by the board of directors or by-laws of the bank.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XXXII.

The Court erred in refusing to give the following instruction No. 9 requested by defendant:

If you find that the defendant attempted, without authority from the depositor, to reduce, by means of a memorandum check or charge slip, the amount of money which had theretofore been credited by the bank to the depositor, you cannot simply because of such act find the defendant guilty of misapplying or abstracting the moneys of the depositor, because the amount credited by the bank to the depositor cannot be reduced by that means.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XXXIII.

The Court erred in refusing to give the following instruction No. 10 requested by defendant:

An officer of a bank cannot, without previous authorization to do so by the depositor, reduce, by means

of a memorandum check or charge slip, the amount of money owing from the bank to the depositor.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XXXIV.

The Court erred in refusing to give the following instruction No. 11 requested by defendant:

If you find that the defendant had exclusive power to make loans for the bank, then the defendant was not required to obtain the consent of a depositor having a checking account to the withdrawal, for the purpose of making loans on behalf of the bank, of the moneys deposited by the depositor.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XXXV.

The Court erred in refusing to give the following instruction No. 12 requested by defendant:

There is some testimony on the part of the prosecution tending to show that in some instances a depositor authorized the defendant to take his or her money then on deposit in the bank and loan it on good security and that defendant thereupon took the money and used it himself, placing his personal note in the bank for it.

The defendant, however, contends that in all such cases the depositor authorized him to use the money himself, if he desired so to do. I instruct you, however, that so far as this case is concerned, if you find that as to any sum of money mentioned in any count of the indictment the defendant was authorized to take the same but instructed to loan it on security only and that he thereupon took the money and used it himself, you cannot find him guilty for so doing, for in such case he had authority to withdraw the money from the bank and if, after withdrawing it, he did not loan it as directed but used it himself, he did not thereby violate the statute under which he is being prosecuted here.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XXXVI.

The Court erred in refusing to instruct the jury to return a verdict for the defendant on the ground that sufficient evidence in law of intent to defraud on the part of the defendant had not been introduced in this cause; to which ruling of the Court the defendant then and there duly and regularly excepted.

XXXVII.

The Court erred in refusing to instruct the jury to return a verdict in favor of the defendant on the ground that sufficient evidence in law had not been introduced

in this cause that defendant did not have authority to withdraw or abstract the money deposited in the bank of which he was the president in the manner and by the method which the uncontradicted evidence showed had been employed by him; to which ruling of the Court the defendant then and there duly and regularly excepted.

XXXVIII.

The Court erred in refusing to instruct the jury that sufficient evidence had not been introduced to justify the jury in finding that defendant withdrew or abstracted money belonging to any of the depositors who have testified as witnesses in this case; to which ruling of the Court the defendant then and there duly and regularly excepted.

XXXIX.

The Court erred in refusing to give the following instruction requested by defendant:

I ask the Court at this time to instruct the jury that the indictment in this case charges the defendant with having abstracted moneys, funds and credits of the First National Bank of Roseburg, Oregon, and that therefore, if the jury find that the moneys, funds, or credits abstracted by the defendant as shown by the evidence in this case were moneys, funds, or credits of the depositors who have testified in this case, the jury should find the defendant not guilty.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XL.

The Court erred in failing to instruct the jury that sufficient evidence in law had not been introduced in this cause to justify the jury in finding that any of the depositors who had testified in this case had been defrauded by the acts of defendant; to which omission, failure and refusal of the Court the defendant then and there duly and regularly excepted.

XLI.

The Court erred in overruling and denying defendant's motion in arrest of judgment.

XLII.

The Court erred in abusing its judicial discretion in overruling and denying defendant's motion for a new trial hereof; and, in this connection, in refusing to hold and decide:

(1) That the verdict herein was contrary to the evidence adduced upon the trial hereof;

(2) That said evidence was insufficient to justify said verdict; and,

(3) That said verdict was contrary to law for the reasons in this Assignment of Errors particularly set forth.

XLIII.

The Court erred in pronouncing judgment and sentence against the defendant.

WHEREAS, by the law of the land, said judgment ought to be given for said defendant Thomas R. Sheridan, plaintiff in error herein, and against the plaintiff United States of America, defendant in error herein, said defendant Thomas R. Sheridan does now pray that the judgment herein rendered against him be reversed and annulled and altogether held for nothing, and the sentence herein imposed upon him be set aside and held for naught, and that he be restored to all things which he has lost by occasion of the said judgment; that the said District Court be directed to sustain defendant's demurrer to said indictment, or to grant a new trial of said cause; and that defendant be afforded such and any and all other relief as may be meet in the premises.

Dated this 19th day of October, A. D. 1915.

J. L. McNab,
Attorney for said Defendant
Thomas R. Sheridan.

Due service of the within Assignment of Errors by delivery of a copy to the undersigned is hereby admitted this 19th day of October, 1915.

Clarence L. Reames,
United States Attorney.

United States of America,
District of Oregon—ss.

I hereby certify that the foregoing Assignment of Errors is made on behalf of petitioner for a Writ of Error herein, and is in my opinion well taken, and the same now constitutes the Assignment of Errors upon the writ prayed for.

J. L. McNab,
Attorney for Plaintiff in Error.

Filed October 25, 1915—G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit: on Monday, the 25th day of October, 1915, the same being the ninety-seventh judicial day of the regular July, 1915, term of said Court, the following order of the Honorable Frank H. Rudkin, United States District Judge for the Eastern District of Washington was entered of record in said court, to-wit:

ORDER ALLOWING WRIT OF ERROR.

Thomas R. Sheridan, the defendant in the above-entitled cause, having filed herein and presented to the Court his petition praying for the allowance of a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to the above-entitled court, and having submitted therewith the Assignment of Errors intended to be urged by him; praying also that a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to said United

States Circuit Court of Appeals for the Ninth Circuit, and praying also that meanwhile all further proceedings in the above-entitled District Court be suspended, stayed and superseded, and that sentence and execution herein be stayed until the final disposition of said Writ of Error in the aforesaid United States Circuit Court of Appeals;

NOW, THEREFORE, in consideration of the premises, and the Court being fully advised, and the above-named defendant having heretofore submitted to the above-entitled Court his bond for appearance in the United States District Court for the District of Oregon, or in the United States Circuit Court of Appeals for the Ninth Circuit, as may hereafter in this cause be ordered, in the sum of six thousand dollars (\$6,000.00), said sum being the amount of bail heretofore fixed by this Court for said defendant, and said bond having been heretofore accepted and approved by this Court;

IT IS HEREBY ORDERED that the aforesaid Writ of Error be, and the same is, hereby allowed; and

IT IS FURTHER ORDERED that a transcript of the record, proceedings, and papers in this cause, duly authenticated, be sent to the aforesaid United States Circuit Court of Appeals for the Ninth Circuit; and

IT IS FURTHER ORDERED that all further proceedings in this above-entitled District Court be suspended, stayed, and superseded until the final disposition of said Writ of Error in the aforesaid United

States Circuit Court of Appeals for the Ninth Circuit;
and

IT IS FURTHER ORDERED that sentence and execution herein be stayed until the final disposition of said Writ of Error in the aforesaid United States Circuit Court of Appeals for the Ninth Circuit; and

IT IS FURTHER ORDERED that the bond for costs upon the Writ of Error herein be, and it is hereby, fixed at the sum of One hundred dollars.

Dated October 19th, 1915.

Frank H. Rudkin,
United States District Judge.

Filed October 25, 1915—G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit: on the 29th day of October, 1915, there was duly filed in said Court and cause, a Bond on Writ of Error, in words and figures as follows, to-wit:

BOND.

*In the District Court of the United States, for the
District of Oregon.*

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

THOMAS R. SHERIDAN, *Defendant.*

BOND FOR COSTS ON WRIT OF ERROR TO
THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT
OF OREGON.

KNOW ALL MEN BY THESE PRESENTS,
That we, Thomas R. Sheridan, as principal, and Timothy Healy, as surety, are held and firmly bound unto the United States of America in the full and just sum of One Hundred Dollars, to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

WHEREAS, lately at a District Court of the United States for the District of Oregon, in a suit depending in said Court, between the United States of America, plaintiff, and Thomas R. Sheridan, defendant, a judgment and sentence were rendered against the said

Thomas R. Sheridan, and the said Thomas R. Sheridan having obtained from said Court a writ of error to reverse the said judgment and sentence against him in the aforesaid cause, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within thirty (30) days from and after the day of said citation, which citation has been duly served;

NOW the condition of the above obligation is such that if the said Thomas R. Sheridan shall prosecute said Writ of Error to effect, and answer all costs involved therein, then the above obligation to be void; else to remain in full force and virtue.

Thomas R. Sheridan, (Seal)

By J. L. McNab, his Attorney.

Timothy Healy. (Seal)

Signed, sealed, taken, and acknowledged before me this 19th day of October, 1915.

Walter B. Maling, (Seal)

United States Commissioner,
Northern District of California.

Form of bond and sufficiency of surety approved this 25th day of October, 1915.

Frank H. Rudkin,

United States District Judge.

Filed October 29, 1915—G. H. Marsh, Clerk.

United States of America,
District of Oregon—ss.

I. G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on writ of error in the case in which the United States of America is plaintiff and defendant in error and Thomas R. Sheridan is defendant and plaintiff in error in accordance with the law and the rules of the Court and in accordance with the praecipe of said plaintiff in error, and that the said transcript is a full, true, and correct transcript of the record of proceedings had in said Court in said cause in accordance with the said praecipe as the same appear of record on file at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Portland in said District, this day of November, 1915.

Clerk.

In the United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS R. SHERIDAN,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA
Defendant in Error.

Filed

FEB 7 - 1916

F. D. Monckton,
Clerk

In Error to the District Court of the United States
for the District of Oregon

BRIEF OF PLAINTIFF IN ERROR

JOHN L. McNAB,
Attorney for Plaintiff in Error.

JAS. W. RYAN,
Of Counsel.

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No. 2705

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THOMAS R. SHERIDAN,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA

Defendant in Error.

In Error to the District Court of the United States
for the District of Oregon

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

On February 21st, 1914, an indictment containing eight counts was returned in the United States District Court at Portland, Oregon, charging the defendant, Thomas R. Sheridan, with a violation of Section 5209 of the Revised Statutes of the United States.

The first count charged:

“That Thomas R. Sheridan, the above named defendant, heretofore, to-wit, on the 7th day of March, 1911, in the County of Douglas, within the State and District of Oregon, and within the jurisdiction of this Court, was then and there President of a certain National Banking Association, to-wit: The First National Bank of Roseburg, Oregon, theretofore duly organized and established and then and there existing and doing business at the City of Roseburg, in the County of Douglas, within the state and district aforesaid, under the laws of the United States, and that he, the said Thomas R. Sheridan, so then and there on the date last above mentioned being such president, did then and there at the said City of Roseburg, County of Douglas, in the State and District of Oregon, on to-wit: the 7th day of March, A. D., 1911, wilfully and unlawfully abstract and convert and cause to be abstracted and converted to his, the said Thomas R. Sheridan’s own use, benefit and advantage, and to the use, benefit and advantage of one B. C. Agee, certain moneys, funds and credits of said National Banking Association, of the amount and value of Two Hundred and Thirty (\$230) Dollars, a more particular description of which is to this grand jury unknown, from and out of the moneys, funds and credits of said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of one David Hull, a depositor and creditor of said The First National Bank of Roseburg, by means of a certain instru-

ment designated as a memorandum check, without the knowledge and consent of said National Banking Association, and with the intent then and there on the part of him, the said Thomas R. Sheridan, to injure and defraud the said National Banking Association and said depositor and creditor therein;

“Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.”

The fourth count charged:

“That Thomas R. Sheridan, the above named defendant, heretofore, to-wit: On the 15th day of April, 1911, in the County of Douglas, within the State and District of Oregon and within the jurisdiction of this Court, was then and there president of a certain National Banking Association, to-wit: The First National Bank of Roseburg, Oregon, theretofore duly organized and established and then and there existing and doing business at the City of Roseburg, in the County of Douglas, within the state and district aforesaid, under the laws of the United States, and that he, the said Thomas R. Sheridan, so then and there on the date last above mentioned, being such president, did then and there at the said City of Roseburg, County of Douglas, in the State and District of Oregon, on to-wit: the 15th day of April, 1911, willfully and unlawfully abstract and convert and cause to be abstracted and converted to his, the said Thomas R. Sheridan's own use, benefit and advantage, certain moneys, funds and credits of

said National Banking Association, of the amount and value of Five Thousand (\$5,000) Dollars, a more particular description of which is to this grand jury unknown, from and out of the moneys, funds and credits of said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of one Laura M. Verrell, a depositor and creditor of said The First National Bank of Roseburg, by means of a certain instrument designated as a memorandum check, without the knowledge and consent of said National Banking Association, and with the intent then and there on the part of him, the said Thomas R. Sheridan, to injure and defraud the said National Banking Association and said depositor and creditor therein;

“Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.”

As stated by the Court below in charging the jury, the remaining six counts “are in all respects similar to the first, except as to the date of the abstraction, the amount abstracted, the name of the depositor and the person to whose use, benefit and advantage the moneys were appropriated.”

The defendant interposed a demurrer to the indictment, specifying reasons why the indictment did not state an offense against the United States. The Court below overruled the demurrer, to which ruling the defendant excepted.

The cause came on for trial on March 23rd, 1915.

The evidence showed that the defendant had been President of The First National Bank of Roseburg, Oregon, since 1891. The uncontroverted testimony of the Cashier of the Bank, a witness for the Government, was that:

“In the years 1910 and 1911 the directors of the bank were Thomas R. Sheridan, J. C. Sheridan, myself, Warren Reed, Morris Weber; Thomas R. Sheridan is the defendant in this case and J. C. Sheridan was a brother. It was the duty of J. C. Sheridan to write up pass books, post the general ledger and take charge of them. My duties as cashier was to keep the books, reconcile statements, clerical duties and to look after the accounts and books. Warren Reed was a director; he was a merchant and lived at Gardiner, which was located about 60 miles from Roseburg on the Umpqua River. Morris Weber was a director; he was a farmer. *Mr. Sheridan and myself ran the bank.* We all had our duties to perform in there. *I didn't have charge of the loans. I never assumed any authority in the loans. He made those himself.* I might have made some small loans, but no large ones. T. R. Sheridan did have charge of making the loans for the bank.”

The evidence in regard to the first count of the indictment is as follows:

David Hull, who had a general checking account with The First National Bank of Roseburg, testified

that (Tr., p. 40) "I had a conversation with Mr. Sheridan (the defendant) relative to the loaning of some of my money in March, 1906. I told Mr. Sheridan, one day I met him, I had some money. I said, 'Mr. Sheridan, how about loaning out some money to a good man?' 'Am I a good man?' I said, 'Yes, sir, you are, Mr. Sheridan.' I never gave him any other authorization except that."

The Government offered in evidence a promissory note (Government's Exhibit No. 2), dated March 2, 1906, for \$512.50, executed by the defendant in favor of Hull, payable on demand, with interest at six per cent, to show, as stated by the United States Attorney, that (Tr., p. 40) "what authority he (the defendant) had was limited to this \$500 loan, and that he got that, but that he had no authority to loan any more."

On being recalled for cross-examination, Hull testified (Tr., p. 142) that, "I told Mr. Sheridan to use \$500, certainly."

This transaction was not the basis of any charge, nor mentioned in any count of the indictment, but was, as stated by the United States Attorney, merely introductory to the evidence offered in support of the first count.

The transaction on which the first count is based was as follows:

The defendant drew a memorandum check or charge slip (Government's Exhibit No. 4), dated March 4, 1911, to the order of B. C. Agee, against the general checking account of David Hull. When Hull called at the bank to have his bank or pass book balanced, this memorandum check was given to him with the checks which he had drawn against his account and which had been paid and cancelled by the bank (Tr., p. 58). The memorandum check was also charged against Hull's account in the pass book when it was balanced, and Hull kept the pass book in his own possession (Tr. 56). The defendant testified that (Tr. p. 213) he drew this memorandum check "for the purpose of putting the money out at interest; the memorandum checks were given to the bookkeeper, passed through the regular form by him, written up, and charged to the account of the party."

The defendant also executed a promissory note (Government's Exhibit No. 6), dated March 4, 1911, for \$230, payable on demand, to David Hull, purporting to have been signed B. C. Agee, by T. R. S. (Tr. p. 64).

The defendant testified that he put this note, together with another, (Tr., p. 213) "in an envelope marked David Hull, and put them in the alphabet H, in the vault of The First National Bank; I left them there and never took them out. . . . The one (promissory note for \$230, Government's Exhibit No. 6) signed B. C. Agee, by myself, went to the credit, as I see by the notation of March 3, 1911, of B. C. Agee's account."

The defendant also wrote a deposit slip (Government's Exhibit No. 7), dated March 4, 1911, for \$230 in favor of B. C. Agee.

On March 4, 1911, the account of B. C. Agee was credited with \$230 (Tr., pp. 66 and 67).

The unimpeached and undisputed testimony of the Cashier of The First National Bank, a witness for the Government, was that on March 7th, 1911, three days after the credit had been entered in Agee's account, a charge was entered against David Hull's account for \$230 (Tr., p. 66).

There is no evidence whatever that any checks were ever drawn against the credit entered in Agee's account, either by Agee or the defendant or anyone else. On the contrary, the evidence shows that Agee did not know until the time of the trial that the credit had been given to his account. Agee testified that the defendant was interested in and was financing the farming business of Agee, and that (Tr., p. 185) "I relied on him almost entirely to be financed; *I understand it is proven here that this money went into my account and that I was given credit for this money*; I don't know whether it was the understanding or not; he always handled the money and we attended to the ranch; he handled the money; I left that all with Mr. Sheridan."

The defendant testified as follows (Tr., p. 212): "I have known David Hull for eight or ten years;

Mr. Hull came to the bank and asked me if I could get some interest for him from his money; he said he did not want it to lie idle; I told him 'yes;' I told him I could use it and he said all right; he says, 'I don't need only a little money.' He said, 'It don't cost me much to live and I will have money from time to time that I will put in here and you can handle it for me any way you see proper.' I loaned it from time to time and as the loans were paid off I would give him credit in the book and then loan it out again."

David Hull testified as follows (Tr., p. 41): "Mr. Reames: Q. Did you ever authorize Mr. Sheridan to loan your money to Mr. B. C. Agee? A. No; I never did."

The evidence in regard to the fourth count of the indictment is as follows:

Money belonging to Mrs. Laura M. Verrell had been lent on a mortgage. On the maturity of the mortgage, the principal and interest, amounting to \$4,000, were entered to the credit of her general checking account with The First National Bank of Roseburg, Oregon. The defendant, the President of The First National Bank of Roseburg, and Mrs. Verrell had a conversation (the date of which is not shown by the evidence) in which, as testified by Mrs. Verrell (Tr., p. 74) "He asked me if I wanted to loan that money that was paid in on the mortgage; he said he would get a good loan for me, and I supposed it was to be the bank would loan the money. There

was nothing said about it, that the bank was to loan the money, but he asked, not individually, but as president of the bank. . . . Mr. Sheridan wanted to know if I wanted to loan it, and I said I didn't know, I was intending to put it into real estate, and he said I better loan it, it would bring me more, and I didn't want to give him any answer at that time, I wanted to think it over, which I did, and he wanted to know at that time if I wanted to put any more with that \$4,000, and I told him I didn't know, that I would think it over, which I did and I told him that I would put some more that time, but there was nothing said of how much to put with it, how much I would put with it, because at that time I expected to see him again before this loan was made. . . . That is all the conversation we had until he handed me the memorandum check; there was nothing said as to when the money was to be drawn from the bank or how. . . . When he handed me the memorandum check, I never saw a memorandum check before, and I supposed that was to show the bank had loaned the money. . . . He said my money was safe, safely invested, and I told him at that time that I didn't know as I ought to spare that much, and he said I could have it at any time by giving a short notice, so I let it go at that, and I supposed that my money was loaned by the bank. . . . I never told him to take that money and lend it to himself."

The defendant drew a memorandum check (Government's Exhibit No. 9) against Mrs.

Verrell's account, dated April 15, 1911, in the sum of \$5,000 and executed a promissory note of the same date to Mrs. Verrell in the same sum, payable one year after date. Mrs. Verrell testified (Tr., p. 78), "I can't remember the date when he gave me that memorandum check; I remember I was in the bank and he handed me that check. (Tr., p. 74). This note I never had in my possession and I never saw it until I saw it before the grand jury at Roseburg, Oregon, a year ago last November."

The defendant testified that (Tr., p. 214), "In regard to the loan of Laura Verrell I have to say that before the Crouch \$4,000 loan became due I wrote to Mrs. Verrell and told her that the money would soon be paid off and that if she wanted it to draw more interest, or words to that effect, that I could place it safely. My letter was dated April 6, 1911, and is Government's Exhibit No. 8. Shortly after that she came into the bank and as I remember she did not have quite enough money there, and she put in some money, and in the conversation I asked her if she wanted to lend that money out, and she said she did. I told her as soon as I was able to place it I would advise her and charge her account and put the document in the usual place, which I did. The memorandum check went through the books and I suppose it went to her in the usual course of business. It went to the bookkeeper." There is no evidence as to what was done with the promissory note, or that it was executed prior to or delivered or shown by de-

fendant to anybody prior to the time when it was shown to Mrs. Verrell before the grand jury.

The Cashier of The First National Bank testified (Tr., p. 88) that, "This is the individual depositors' book. I find an item on page 386 thereof, under date of April 15, 1911, in the account of Laura M. Verrell 'loaned by T. R. S.' The item shows that \$5,000 was debited her account on that day." "The defendant admitted that this \$5,000 was transferred to the account of Mr. Sheridan on the books" (Tr., p. 88).

There is no evidence that any checks were ever drawn against that \$5,000 credit in the account of the defendant, or that because of or through such credit any moneys, funds or credits were ever taken or abstracted from the bank by defendant or anyone or converted to defendant's use or the use of anyone, or that at any time the bank has been short in its moneys, funds or credits on hand. Neither is there any evidence that any deposit slip or other instrument was used which enabled or caused anyone to enter the credit in the account of the defendant, nor that the defendant entered the credit or caused it to be entered, nor by whom the credit was entered.

The transactions charged in the remaining six counts of the indictment, as to which the defendant was found not guilty, are substantially identical with those charged in the first and fourth counts, and are, in substance, as follows:

At various times within the three years preced-

ing the return of the indictment the defendant had had conversations with certain depositors of the bank, who had general checking accounts, in regard to their obtaining interest on the amounts of money deposited by them. The defendant told them that it would be necessary to lend the money to third persons in order to earn interest; that a large number of requests for loans for a year or longer on good security were continually being made of the bank; that the bank wished to make only short time loans, but that if the depositors wished he would lend the amount of their accounts on long time loans, retaining part of the interest as compensation to the bank and crediting them with the remainder of the interest. As testified by Mrs. Byron, one of the depositors, (Tr., p. 186) "I was in the bank putting some money in, and Mr. Sheridan said to me, 'You have got too much money, Mrs. Byron, lying in the bank idle.' And I said, 'what will I do with it—if I loan it I lose it.' And he said, 'Leave it here and we will use it and it will make seven per cent for you and one for the bank.' I said, 'All right.'"

Some of the depositors expressed a fear that they might incur a risk if they consented to such an arrangement. The defendant told them that he would execute his own notes to them as security for all loans made to the third persons. For instance, J. E. Haney, one of the depositors, testified that (Tr., p. 107), "I had about \$5,000, perhaps a little more than that, on deposit. The money had been there for two

or three months and I decided it was not doing me much good just laying there. I didn't know as I would want to use it right away and I asked Mr. Sheridan if he could loan it for me, so that I could get some interest out of it, and he said he could, and I said, 'How about—can you give a good security?' and he said, 'Any loan I make, I will O. K. it myself.' He said, 'Will that be all right?' and I said 'It will.' "

Several of the depositors testified that they agreed to the arrangement, some of them testifying that they agreed to it solely because of the promise by the defendant that the bank would guarantee all loans so made, and that they were not to be subject to any risk in connection therewith.

Other depositors testified that there had been conversations between them and the defendant in regard to his lending the amounts of their accounts to third persons so that they could obtain interest, but that they had not given the defendant authority to withdraw their accounts from the bank by means of memorandum checks.

Still other depositors testified that they had not had any conversations with defendant in regard to his lending the money deposited by them, and that they had not given them authority to draw the memorandum checks on their accounts or to lend the money deposited by them to anyone; but some of those depositors testified that they had received interest on their deposits, but did not inquire from the de-

fendant or any other officer of the bank why interest was being credited to them.

All the depositors who had the conversations with the defendant testified that they were to be subject to no risk whatever in connection with the loans to such persons; that the loans were to be solely at the risk of the bank; and in those instances where they knew that the amounts of their accounts had been lent they did not know, except in a few cases, the names of the persons to whom the loans had been made.

Some time after each of the conversations above mentioned between himself and the depositors regarding the latter's obtaining interest on the amounts of their deposits, the defendant drew a memorandum check against the account of the depositor. This check was charged against the depositor's account and was sent to the depositor with the next statement of account forwarded to him, attached to which were the checks which were the checks which had been drawn by the depositors against his account and had been paid by the bank. At or about the same time the defendant executed a promissory note to the depositor, either in his own name or in the name of a third person by himself. The third person was the person to whom the defendant had lent the amount of the promissory note. From the time of the execution of the promissory note by the defendant the depositor received interest on the amount of money he had deposited with—that is, lent to—the bank. The

defendant then wrote a deposit slip in favor of the third person for the amount of the promissory note and gave it to the proper clerk of the bank, whereby the amount of the deposit slip was entered on the books of the bank to the credit of the account of the third person. *There is no evidence that any money of the bank has ever been withdrawn from the bank by the defendant or anyone because of the credit thus given.* In the instances where defendant executed a promissory note without signing the name of a third person, the evidence merely was that the account of the defendant with the bank had been credited in an amount equal to that named in the memorandum check. There is no evidence that any check was ever drawn against that credit.

In 1911 an agreement was entered into between The First National Bank of Roseburg and the Douglas County National Bank of the same city, whereby the two banks were consolidated under the name of the Douglas County National Bank and the assets and liabilities of The First National Bank were assigned to and assumed by the Douglas County National Bank. For the purpose of executing that agreement, The First National Bank was placed in voluntary liquidation in accordance with the provisions of the statutes of the United States and a trustee appointed. In June, 1911, shortly after The First National Bank was placed in liquidation, it was examined by a National Bank Examiner. In examining the securities file of the bank, the Exam-

iner found the promissory notes above mentioned, and thereupon interviewed the defendant regarding them. The defendant told him all the circumstances attending their execution and that the depositors had in each instance authorized him to draw the memorandum checks and execute the notes—in other words, to change the accounts of the depositors from general checking deposits (that is, loans to the bank due and payable on demand), into time deposits, (that is, loans to the bank due and payable only at the expiration of a specified period), in consideration of the receipt of interest by the depositor on the amount of the deposit. The Examiner then wrote a letter to each depositor asking him if he had given the defendant authority to withdraw the amount of his account, and, if so, to sign a bank form of release attached to the letter, and return it to the Examiner. *All the depositors, including David Hull and Mrs. Verrell, signed the releases and forwarded them to the Examiner.*

The evidence introduced by the defendant tended to show—and the Government admitted—that the defendant had resided in Oregon for fifty-nine years and during all that time had had the very highest reputation in that community for truth, honesty, and integrity.

The defendant testified that all the depositors who had testified in the cause "wanted interest on their money and it was clearly understood between us that the money would have to be loaned in order

to make interest;” in other words, that the depositors’ accounts would have to be changed from demand loans to the bank into time loans for the periods of the loans made to the third persons, and consequently, as the depositors thereby waived their right to have general checking accounts subject to be withdrawn at any time, the bank had a right to terminate the general checking accounts either by drawing memorandum checks against them or by making an entry on its books that the accounts had been converted into accounts which could be withdrawn only at the expiration of a specified period, or by any other method of bookkeeping which the bank should choose to adopt.

The Court instructed the jury that:

“The principal question for your consideration will be—or at least the first question for your consideration will be: Was the defendant authorized by the depositors to withdraw these moneys? If you find from the testimony in this case that he was so authorized or if you find from the course of dealing between the defendant and the depositor that the defendant had reasonable cause to believe and on good faith did believe that he was so authorized, then he is not guilty of the crime here charged. But if you are satisfied beyond a reasonable doubt that he had no authority from the depositor to withdraw the funds, and if you further find that he had no reasonable cause to believe and did not in good faith believe that he had such authority, then his abstraction of the funds was wrongful,

and the crime is complete if you find that the abstraction was made with the intent to injure or defraud either the banking association or the depositor. (Tr., p. 233).

“If, therefore, you find from the evidence beyond a reasonable doubt that the defendant, Thomas R. Sheridan, without having previously secured the authority of the depositors so todo, or without apparent authority as I have defined that term to you, willfully abstracted the funds of the bank then held in said bank to the credit of said depositors in manner and form as alleged in the indictment, and converted said funds to his own use and benefit, the extent to injure and defraud both the bank and the said depositors may be by you presumed. Acts which involve such consequences, when knowingly and wrongfully committed, establish not only the guilty intent to injure and defraud mentioned in the statute, but they disclose moral turpitude utterly inconsistent with an innocent intent.”

Among the instructions which the defendant requested the Court to give to the jury were the following:

“I ask the Court at this time to instruct the jury that sufficient evidence in law has not been introduced in this case to justify them in finding that defendant withdrew or abstracted money belonging to any of the depositors who have testified as witnesses in this case, on the ground that when a depositor deposits money in a national bank as the depositors testifying in

this case have done, the money so deposited ceases to be the money of the depositor and becomes the bank's money, and that there is merely a creditor and debtor relation between the depositor and the bank, and therefore that the money withdrawn or abstracted by the defendant was money belonging to the bank. (Tr., p. 242.)

"I also particularly except to the Court's refusal to instruct the jury in accordance with defendant's requested instruction No. 5, that an officer of a National Bank who has full charge of making loans on behalf of the bank, has a right to lend any portion or all of the money deposited in the bank by depositors on general checking accounts, without first obtaining permission from the depositor or depositors to do so. (Tr., p. 234.)

"I ask the Court at this time, if the Court please, to instruct the jury that the indictment in this case charges the defendant with having abstracted moneys, funds and credits of The First National Bank of Roseburg, Oregon, and that therefore, if the jury find that the moneys, funds or credits abstracted by the defendant as shown by the evidence in this case were moneys, funds or credits of the depositors who have testified in this case, the jury should find the defendant not guilty. (Tr., pp. 242-243.) . .

"I take an exception to the refusal of the Court to instruct the jury to return a verdict for the defendant on the ground that sufficient evidence in law of intent to defraud on the part of

the defendant has not been introduced in this case, and as that is an essential element of the crimes charged that therefore the jury would not be justified in returning a verdict against the defendant on any or all of the counts in this indictment. (Tr., pp. 241-242.)

“I except to the Court’s refusal to instruct the jury to return a verdict in favor of the defendant on the ground that sufficient evidence in law that defendant did not have authority to withdraw or abstract the money deposited in the bank of which he was the president, in the manner and by the method which the uncontradicted evidence in this case shows was employed by him, has not been introduced in this case.” (Tr., p. 242.)

The jury returned a verdict against the defendant on counts Nos. 1 and 4 of the indictment, finding him not guilty as to the remaining counts.

After the jury had returned its verdict, the learned judge presiding, notwithstanding its verdict, said from the bench that he did not believe the evidence showed an intent to defraud on the part of the defendant.

The defendant moved in arrest of judgment, and for a new trial. The Court denied the motions, and thereupon sentenced the defendant to imprisonment for five years in the United States Penitentiary at McNeil’s Island, Washington.

ARGUMENT

The Demurrer to the Indictment Should Have Been Sustained

(1) **The unlawful abstraction and conversion of money which a bank holds for the sole use and benefit of a depositor is not an offense against the United States.**

The first count of the indictment describes the money charged to have been abstracted and converted by defendant as "certain moneys, funds and credits of said National Banking Association, of the amount and value of Two Hundred and Thirty (\$230.00) Dollars, a more particular description of which is to this grand jury unknown, from and out of the moneys, funds and credits of said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of one David Hull, a depositor and creditor of said The First National Bank of Roseburg."

Section 5209, R. S., prohibits only abstractions of moneys which are held by the bank *as a bank* and not as a special bailee. The unlawful abstraction of moneys held by the bank as a special depositary or bailee is punishable under the laws of the State where the abstraction is committed.

Section 5209, R. S., is a re-enactment, *without*

amendment, of the Act of Congress of June 3, 1864, Sec. 55, ch. 106, 13 Stats. at L. 116. With reference to the latter statute, in *Commonwealth vs. Tenney*, 97 Mass. (15 Allen) 50, 56, in which the defendant, a clerk of a national banking association, had been convicted under the general statutes of Massachusetts of fraudulent conversion of property of individuals deposited with and in the custody of the bank, the Court said:

“The further objection is made, that the courts of the United States are vested by the Judiciary Act of September 24, 1789 (U. S. Stats. 1789, c. 20, sec. 11), with exclusive cognizance of all crimes cognizable under the authority of the United States, except where it is otherwise provided by the acts of Congress. But an examination of the statutes of the United States leads us to the conclusion that the offense charged in this indictment has not been made punishable by any act of Congress. *The enactments cited on behalf of the defendant punish the embezzlement of the property of national banks, but not the property of individuals, deposited with and in the custody of such banks.* U. S. St. 1863, c. 58, sec. 52. U. S. St. 1864, c. 106, sec. 55. As the federal courts have no criminal jurisdiction except that conferred by Congress, no question can be made as to the constitutionality of State legislation punishing such frauds, until they have been made punishable by the federal laws. There is no view of the relative, or of the concurrent, powers of the two governments which affects the decision of the present

case; for all courts and jurisdictions agree that State sovereignty remains unabridged for the punishment of all crimes committed within the limits of a State, except so far as they have been brought within the sphere of federal legislation by the penal laws of the United States. *Commonwealth vs. Fuller*, 8 Met. 313; *Commonwealth vs. Peters*, 21 Met. 387."

In *State vs. Tuller*, 34 Conn. 280, the information under a Connecticut statute charged the teller of a national banking association with the "theft and embezzlement" of certain bonds in the bank, particularly described the bonds, and then set forth that the bonds were "the property and estate of Loyal Wilcox of said Hartford, the same having been by him, the said Wilcox, deposited with said bank in the banking house of said bank for safe keeping, and then and there deposited in said banking house." The Court said:

"Congress by the National Currency Act incorporated the bank in question as a bank, located within this State. They enacted all the provisions which were necessary to constitute it a corporation and give it being, and all of power or restraint that they deemed essential to regulate that being. They authorized it in general terms to do a *banking* business, but they did not undertake, by any regulation or restraint, to regulate that business; and they left that to be regulated by the laws of the State and land. They did enact in the 55th section of the Currency Act (*which is identical with Section 5209,*

R. S.) that if any teller or other officer of the bank should embezzle the *property of the bank* they should be punishable by fine and imprisonment. That provision goes to the being and internal working of the bank, and is intended to protect its property from its agents. *It was not intended to regulate, and has not the effect of regulating, the business of the bank with its customers.* Now the business of the bank is conducted within the jurisdiction of this State, with our citizens, and in conformity to our laws, and it is competent for the legislature to pass any law affecting that business, or protect the bank and its customers in the conduct of that business by any penalty, and such law and penalty will not be predicated on any law or offense created by Congress, or have any relation or be repugnant to the Currency Act, or in any manner infringe the jurisdiction of Congress or the federal courts. As a corporation being located in the State, its property and interests and business are protected by State laws and subject to State legislation, and so it is competent for the legislature to protect its customers, the citizens of the State, in their business dealings with it, whatever they may be, whether constituting the relation of borrower and lender, or of special or general depositary and bailee; and they may be controlled and protected by penal enactments, without interference with the laws of Congress. Such is the character of the statute in question. It is in part repugnant to the law of Congress, but it also protects a special depositor of the bank against the felonious or fraudulent appropriation of the deposit by

the agents of the bank, who have access to it, and so far forth it is not open to the objections urged.

“The second claim is also without foundation. The property is not laid in the second count as the property of the bank; but as a special deposit by a third person, differing from money deposited on general account, intended by both parties to be mingled with the assets of the bank and to become its property. These special deposits are very common, and that fact, and the language used, taken in connection with the provision in respect to the persons who may be defrauded, makes it very clear that the legislature intended to provide for just such a case.”

In *Ex parte Houghton*, 8 Fed. 897, the Court, in discussing the criminal jurisdiction of State courts over officers of national banks in the absence of federal legislation, said approvingly:

“The Supreme Court of Massachusetts took jurisdiction over an embezzlement of a private special deposit in a national bank by an employee of the bank, on the ground that Congress had not provided for that particular offense. *Commonwealth vs. Tenney*, 97 Mass. 50.”

The title to the thing deposited specially is not in the bank, but remains in the depositor.

Marine Bank vs. Fulton, etc. Bank, 2 Wall. 252.
Thompson vs. Riggs, 5 Wall. 663.

Bank vs. Wister, 2 Pet. 318.

Scammon vs. Kimball, 92 U. S. 362.

State Nat. Bank vs. Dodge, 124 U. S. 333.

Phoenix Bank vs. Risley, 111 U. S. 125.

San Diego County vs. Cal. Nat. Bk., 52 Fed. 59.

A special deposit cannot be checked upon, because it does not belong to the bank.

Hodgin vs. People's Nat. Bank, 125 N. C. 503, 34 S. E. 709.

Bank vs. Armstrong, 15 N. C. 519.

(2) If the offense charged in the indictment is a misdemeanor, then, as no punishment has been provided for it by Congress, the indictment does not state an offense against the United States.

The Act of Congress of March 4, 1909, ch. 321, sec 335, 35 Stats. at L. 1080, 1152 (creating the so-called Federal Penal Code of 1910), provides that:

“All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.”

It is a corollary of that statute that “No misdemeanor shall be punished by imprisonment for a term exceeding one year.”

Since Section 5209, R. S., expressly declares that the offense charged in the indictment is a misdemeanor, a modification or repeal of the punishment will not be construed as changing the nature of the offense. The distinction between a felony and a misdemeanor is far more important than the modification or repeal of the punishment for a particular crime. The offense is distinct from the punishment provided for that offense, and either may be modified or repealed without affecting the other. For example, if the punishment for a misdemeanor is repealed by statute, and the misdemeanor is a common law misdemeanor, the punishment provided by the common law may be imposed. But the offense denounced by Section 5209, R. S., is not a common law misdemeanor or felony. Under the common law it is a mere, unpunishable, breach of trust. Therefore, since no punishment is provided by either the common law or the statute, an indictment charging the commission of the acts denounced by Section 5209, R. S., does not state an offense against the United States. Changes by implication in statutes of the nature of offenses, as distinguished from changes in the extent of punishment, are not favored. It is well-settled that no violation of the laws of the United States is a felony unless it is *expressly* declared to be so by an Act of Congress. *In re Acker*, 66 Fed. 290.

A milder new punishment—that misdemeanors shall be punished by imprisonment for not longer

than one year—should be held to repeal an older and severer punishment.

In Clark and Marshall on The Law of Crimes (2nd ed.), page 7, it is said:

“The chief division of crimes is into felonies and misdemeanors. The distinction is of great importance. . . . The common law felonies were murder, manslaughter, rape, sodomy, robbery, larceny, arson, burglary, and perhaps mayhem. In this country there is no forfeiture of property on conviction of crime, but the distinction between felonies and misdemeanors is still recognized, and, as stated above, it is very important. . . . *An offense cannot be construed as impliedly made a felony by statute, unless such an intention on the part of the legislature is clear, and the implication is a necessary one.*”

The statute of 1909 should be construed to declare as felonies only those offenses for which punishment for a term exceeding one year has been provided, *but which have not been specifically designated as misdemeanors.*

As the statute of 1909 is composed of general terms or expressions, and is inconsistent with the more specific and particular provisions in Section 5209, R. S., the provisions of Section 5209, R. S., as to the character of the offense should be given effect, as greater and more definite expressions of the legislative will, and the statute of 1909 merely be given effect to the extent of abolishing the punishment.

The offenses denounced by Section 5209, R. S., not being offenses—not even misdemeanors—at common law, the general terms of the statute of 1909 should not be so construed as to impliedly declare them to be the highest grade of offense—that is, felonies.

In *U. S. vs. Sims*, 161, *Fed. 1008*, 1012, the Court said:

“The offense of which Chisholm was convicted (embezzlement of the funds of a national banking association), is, of course, not treason; neither is it under the federal statutes a felony. Section 5209, Revised Statutes. . . . Again, comparing the facts constituting the offense described in Section 5209, Revised Statutes, with the common law rule, I am of the opinion that there is ample authority to sustain the proposition that embezzlement of this kind was at common law no offense at all, but a mere breach of trust. The following authorities sustain this statement of the law (citing cases). . . . ‘Purpose to steal’ is not designated in Section 5209, but the purpose or intent therein stated is ‘to injure or defraud the association, or some other company,’ etc.”

Furthermore, the breaches of trust denounced by the statute are peculiarly misdemeanors, as distinguished from felonies, because they relate to *DEMEANOR* and misconduct “in the business of one’s office.”

(3) If the offense charged in the indictment is a felony, then the indictment is defective because (a) it merely charges the acts constituting the offense in the language of the statute.

An indictment for felony must set forth the acts constituting the crime with much greater particularity than an indictment for a misdemeanor.

The decisions of the United States Supreme Court rendered prior to 1910, determining the sufficiency of the averments in indictments for misdemeanors under Section 5209, R. S., *have been overruled by the Act of Congress enacting the so-called Federal Penal Code of 1910.* The federal courts prior to 1910 determined that indictments under Section 5209 were sufficient if they charged the offense in the language of the statute, because the offense was only a misdemeanor.

In *United States vs. Mills*, 7 Pet. (32 U. S.) 138, an indictment against a letter carrier for embezzling mail entrusted to him for delivery, which was declared a misdemeanor by an Act of Congress, the Supreme Court said:

“The general rule is that in indictments for *misdemeanors* created by statute it is sufficient to charge the offense in the words of the statute. *There is not that technical nicety required as to form, which seems to have been adopted and sanctioned by long practice in cases of felony,* and with respect to some indictments, where

particular words must be used, and no other words, however synonymous they may seem, can be substituted. But in all cases the offense must be set forth with clearness, and all necessary certainty, to apprise the accused of the crime with which he stands charged."

In *United States vs. Morse*, 116 Fed. 429, 432, referring to the contention that as a violation of Section 5209, R. S., was merely a statutory misdemeanor it was sufficient to charge the offense in the indictment in the language of the statute, the Court said:

"However unfortunate, if not unnecessary, was any departure from the plain rule that *a statutory misdemeanor is sufficiently alleged in the language of the statute*, the Britton decisions (U. S. vs. Britton, 107 U. S. 655 and 108 U. S. 192) are plain that not every misapplication is a crime under the Act, and that the test (or at least a test) of criminal misapplication is that there must be a conversion of the moneys, funds or credits of the association by the accused, either for his own use or that of some person other than the injured bank. This is more than a rule of pleading. Unless such conversion be shown in evidence there can be no conversion; but it follows from this substantive law that an indictment alleging willful misapplication must show upon its face the criminality of the transaction described and negative an innocent interpretation, if one be possible."

(3-b) If the offense charged in the indictment is a felony, the description of the property charged to have been abstracted is ambiguous and not sufficiently definite.

Property is required to be very particularly described in an indictment for a felonious taking.

The indictment charges the abstraction of "certain moneys, funds and credits." (Tr. p. 6.)

"Of the amount and value of \$230" is not part of the description of the money, but is mere surplusage, and should be alleged only in cases where the statute declares that abstraction of property exceeding a certain value is a greater crime than abstraction of property of a less value. Besides it should show (1st) how much money; (2nd) how much funds, and (3rd) how much credits separately; else it is fatally defective. (152 Fed. 542 post.)

In *United States vs. Smith*, 152 Fed 542, 544, it was held that an indictment under Section 5209, R. S., which described the property willfully misapplied as "*funds and credits*" was bad, both for duplicity and for insufficient description of the property charged to have been misapplied, the Court saying:

"The remaining five counts, however, require us to ascertain, if possible, the proper signification of the words, '*moneys, funds and credits*,' used in the statute, and this, in some respects, is without difficulty. The word '*money*' is doubtless equivalent to '*currency*,' and its meaning is apparent. But Congress could not have intended that the word '*funds*' or the word

'credits' should be construed to mean the same thing as the word 'money,' or its equivalent, 'currency,' or that the word 'funds' should be regarded as synonymous with the word 'credits.' The three words do not mean, and evidently were not supposed to be construed as meaning, the same thing, as mere tautology was not designed. When we speak of funding an indebtedness, we understand that it is to be put into a more permanent form. In England 'the funds' are considered to be the Government's bonded indebtedness, and not its mere currency or money; and so it is also in the United States. At any rate, a careful consideration induces the court to agree with Judge Priest, in his opinion in the case of *United States vs. Greve*, 65 Fed. 489, that the word 'funds' has a different meaning from the word 'moneys' as used in the statute. In the opinion of the court the word refers to forms of somewhat permanent indebtedness and to a class of securities in which permanent investments are likely to be made.

"The remaining word 'credits' refers to something nearer to the bank's daily business transactions, and should be given a different meaning from that of either of its associate words. We have not found in any of the dictionaries or encyclopædias to which we have access the word 'credits' in the plural form as used in the statute, nor have we found anywhere any precise definition of it as used in Section 5209; but in many cases noted under the word in 2 Words and Phrases, p. 1728, et seq., we find it construed as used in the revenue laws of the

States, and those cases have been instructive. Certainly, as used in Section 5209, it does not mean something which is merely the opposite of the word 'debit,' commonly used in bookkeeping. But, without further enlarging upon the reasons for doing so, the court has reached the conclusion that *the word 'credits,' used in the statute, means debts due the bank, or promises to it to pay money*, namely, such as its notes and bills receivable, as distinguished from more permanent investment securities, like government or other bonds, not payable to the bank, and not evidencing an indebtedness created by its loans to customers. Stated shortly, the court is of opinion that the word 'money' refers to the currency or circulating medium of the country; that the word 'funds' refers to Government, State, county, municipal, or other bonds, and to all forms of obligation and securities in which investments may be made; and that the word 'credits' refers to notes and bills payable to the bank, and to other forms of direct promises to pay money to it.

"The seventh count charges that the defendant willfully misapplied \$2930.60 of the 'funds and credits' of the bank with the various intents denounced by the statute. The word 'money' is not mentioned in this count, and there is no description either of the 'funds' or of the 'credits' so charged to have been misapplied. If the word 'money' alone had been used, it is difficult to see how there could have been any difficulty about the question; but that word was not used at all, and if the court

has correctly ascertained or approximated the proper meaning and signification of the words 'funds' and 'credits,' then there should have been such a particular description of the 'funds' and of the 'credits' as would have enabled the accused to present his defense, and so that the judgment here would bar another prosecution. This result is manifest from the cases of *United States vs. Hess*, 124 U. S. 483; *Evans vs. United States*, 153 U. S. 586; and *Keck vs. United States*, 172 U. S. 436, and cases cited.

"The same considerations must control in disposing of the demurrer to the eighth count of the indictment.

"The ninth count is open to similar objections, with the additional one of duplicity, as this count charges the embezzlement, as well as the willful misapplication, of 'funds and credits' of the bank, without setting forth any particular description of either, and without any express statement as to the amount either of the 'funds' or of the credits which had thus been embezzled or misapplied.

"The tenth count is equally, if not more faulty, inasmuch as it charges the willful misapplication of 'money, funds and credits,' without any particular description either of the funds or the credits alleged to have been misapplied, and without showing how much there was of money and of funds and of credits separately."

In *United States vs. Greve*, 65 Fed. 488, 489-

490, an indictment for a violation of Section 5209, R. S., the Court said:

“As to the second ground, the language of the statute is that ‘the defendant did have and receive,’ etc., ‘certain of the *moneys and funds* of said National Banking Association of *the amount and value of \$5,723.93*. It is a question whether this is not too indefinite, as failing to state the kind of money deposited, that is, whether moneys of the United States or of some other nation; but it is not necessary to hold thus narrowly. The charge is the embezzlement of *moneys and funds*. The words ‘moneys and funds’ are not of identical meaning. ‘Funds’ includes moneys and anything more, such as notes, bills, checks, drafts, stocks, and bonds. Now, what was intended by the phrase ‘moneys and funds’? Was it intended to say ‘moneys and moneys’? The natural interpretation of the phrase is ‘moneys and some other species or character of funds.’ The word ‘funds’ is not used in the alternative as a synonym. It is used in the conjunctive. Its function, as no doubt the purpose of its use was, to add something to the term ‘moneys.’ The charge then is in effect that defendant did have and receive, etc., moneys and other funds, etc. Now is this sufficiently definite?

In the case of *People vs. Cohen*, 8 Cal. 42, the Court said:

“ ‘There is another objection to the indictment which is fatal. It does not state what was the property converted. The language is,

“\$400,000, moneys, goods and chattels.” How can the defendant know what he is charged with, or how prepare for his defense? How much money, what goods, and what chattels?”

“As in the case at bar only money was embezzled, the indictment should charge the embezzlement of money only. If money and other funds were embezzled, the amount and value of the several species of property should be stated. The words ‘and funds’ cannot be rejected as surplusage, for the amount and value stated in the indictment applies to moneys and funds jointly, and rejecting either there is no suggestion in the indictment as to the amount or value of the other.”

The force of this objection becomes all the more apparent when we consider the only allegation as to how the abstraction was accomplished, viz: “by means of a memorandum check.” How could “credits” or “funds” be obtained or abstracted or converted by use of a memorandum check? The indictment is a skeleton as bare as the statute, and forces the defendant to trial with no information sufficient to formulate a defense.

(3-c) If the offense charged in the indictment is a felony, the indictment is defective because the acts constituting the fraud, or from which an intent to defraud may be inferred, are not stated in it.

Fraud, being a conclusion of law, or at least a mixed conclusion of law and fact, it is necessary, in

both bills in equity and in indictments, to state the particulars of the fraud, showing that an undue or unconscionable advantage has been taken of another and that the latter has been injured.

All that is charged in the indictment is that the defendant "abstracted and converted to his own use and benefit . . . *by means of a memorandum check.*" How the check was procured, by whom signed, from whom obtained, how used, what method employed—is nowhere alleged.

In *United States vs. Corbett*, 162 Fed. 687, an indictment for having made false entries in a report of a national bank in violation of Section 5209, R. S., the Court said:

"The indictment also charges that the entries were made with the intent to injure and defraud the bank itself; but how this could be does not appear. It is barely possible that some harm might indirectly have come to the bank by the publication of the false report in the vicinity of the place where the bank was located, but this possibility is not sufficient to show the definite intent shown by the statute. The report must have been made with the purpose on the part of those signing it to injure and defraud the bank. The report could not possibly change the actual condition of the bank, and a false report showing a better condition than in fact existed might as readily be a benefit to the bank as a detriment. At all events the detriment would be merely speculative, insufficient

to afford proof of a positive intent to injure and defraud the bank.”

In *United States vs. Watkins*, 3 Cranch, C. C., (U. S.), 441, the Court said:

“Fraud is an inference of law from certain facts. A fraud therefore is not sufficiently set forth in an indictment unless all the facts are averred which in law constitute the fraud. Whether an action be done fraudulently or not is a conclusion of law so far as the moral character of the act is involved. To aver that the act is fraudulently done is therefore, so far as the guilt or the innocence of the act is concerned, to aver a matter of law and not a matter of fact. *An averment that the act was done with intent to commit a fraud is equivalent to an averment that the act was done fraudulently.* No epithets, no averment of fraudulent intent, can supply the place of an averment of the fact or facts from which the legal conclusion of fraud is to be drawn.”

Such words as fraud, conspiracy with intent to defraud, and words of similar import cannot be used as predicating criminality of facts which in themselves show no criminality.

Ambler vs. Choteau, 107 U. S. 586;

United States vs. Des Moines Co., 142 U. S. 544;

United States vs. Eno, 56 Fed. 220.

In *United States vs. Hess*, 124 U. S. 483, 484, the Court said:

“The doctrine invoked by the Solicitor General, that it is sufficient in an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here. Undoubtedly the language of the statute may be used in the general description of an offense, *but it must be accompanied with such a statement of the facts and circumstances as will* inform the accused of the specific offense, coming under the general description, with which he is charged. . . . In *United States vs. Cruikshank*, 92 U. S. 542 . . . the Court said (p. 558): “It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must *descend to particulars*. 1 Arch. Cr. Pr. and Pl. 291. The essential requirements, indeed all the particulars constituting the offense of devising a scheme to defraud are wanting. Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict.”

(3-d) If the offense charged in the indictment is a felony, the indictment is defective because it does not charge that there has been a violation of a right of either the bank or any depositor.

The abstraction of money of the depositor as charged in the indictment to defendant's own use would be lawful if made with the consent of or au-

thority from the depositor, but the indictment does not allege that the defendant did not have such authority, or that the depositors did not give such consent. It merely alleges that the abstraction was without the knowledge and consent of the *bank*.

(3-e) If the offense charged in the indictment is a felony, the indictment is defective because the charge in the language of the statute that the defendant “unlawfully abstracted and converted” certain property is too indefinite and uncertain to inform the defendant of the specific criminal acts with which he must be charged.

The mere allegation that the abstraction was “by means of a memorandum check” leaves us wholly uninformed as to the method by which it was accomplished. Whose memorandum check? By whom signed? On what deposit drawn and by whom? How was the money on credit or fund obtained by a “memorandum check?” What “credit” was abstracted and by whose check, and how obtained or used?

That moneys have been “unlawfully abstracted and converted” is merely the language of the statute and is a conclusion of law arising from criminal acts. The indictment should allege the specific criminal acts, showing *how the abstraction and conversion were effected*, and that the “abstraction and conversion” resulted therefrom.

In *United States vs. Smith*, 152 Fed. 542, 544, the Court said:

“The mere conclusion of the pleader that the defendant misapplied the credits of the bank is not sufficient. The willful misapplication must appear *from acts alleged to have been done*. No such acts are charged, unless by recital somewhat in the language of the statute.”

In cases of this nature nothing must be left to inference or implication. All must be distinctly and particularly alleged.

United States vs. Martindale 146 Fed. 280-284.

(3-f) The charge in the indictment that the money was abstracted “by means of a certain instrument designated as a memorandum check” is unintelligible and uncertain and repugnant to the other charges in the indictment.

It is impossible to “abstract” money from a bank by means of a check. On presentation of a check to a bank the money is “abstracted” by the teller of the bank to whom the check is presented, and then “given” by the teller to the person presenting the check. In such a case, if the check should not have been paid, the person presenting it might be guilty of obtaining money under false pretenses, but certainly he has not “abstracted” any money from the bank. *If the teller “abstracts” the money and unlawfully converts it to his own use, and places a memorandum check in his files, the memorandum check is not the means by which the money has been abstracted, but, if anything, is merely a means used to conceal the*

fact that an "abstraction" has already been made. Therefore the indictment shows on its face that the "abstraction" charged could not possibly have been committed.

The indictment is barren of all information as to the character of the "memorandum check" and the means by which it was utilized to accomplish the abstraction.

The description of the memorandum check should at least give the names of the parties to it, and the date when it was drawn.

The indictment does not allege:

(a) That the memorandum check was drawn on the national banking association mentioned in the indictment;

(b) That the memorandum check was not signed by the depositor or by the defendant with the authority of the depositor;

(c) That the memorandum check was not as valuable as the money withdrawn by means of it;

(d) That the memorandum check was presented to the bank for payment, or that it was paid by the bank;

(e) That a false credit was secured by the defendant with the bank by depositing the memorandum check, or how it was possible for the defendant

by means of the check to abstract the moneys of the bank;

(f) That the check was drawn in favor of the defendant; or

(g) That the check was drawn by the defendant.

(4) *The grand jury intended to charge the defendant only with having committed a misdemeanor, and not a felony.*

The indictment charges that the abstraction was made "unlawfully" instead of "feloniously." This clearly shows that the grand jury intended to charge a misdemeanor, because the proper adjective to use with reference to acts which are a misdemeanor is "unlawfully," but with reference to acts constituting a felony the word "feloniously" must be used.

Therefore if the defendant be regarded as having been convicted of a felony, he was convicted of an offense of which the grand jury did not intend to indict him. There is only a difference in degree between the case at bar and an instance where a grand jury, intending to indict a man for a disturbance of the peace, finds an indictment on which the man is convicted of murder.

In *Halsbury's "The Laws of England,"* vol. 9, p. 341, it is said:

“Every indictment for a felony must aver that the alleged act or acts was or were done *feloniously*, and if the word ‘feloniously’ is omitted in the indictment the indictment, it seems, is bad (citing cases), and every indictment for a misdemeanor must aver that the alleged act or acts was or were done ‘unlawfully.’ An indictment for a misdemeanor which contains the word ‘feloniously’ is, it seems, bad.”

In *United States vs. Greve*, 65 Fed. 488, 489, an indictment for a violation of Section 5209, R. S., the Court said:

“Embezzlement, in its technical sense, and with respect to such punishment as the statute under consideration (Section 5209, R. S.) prescribes, most usually means a felonious appropriation by a servant of his master’s property while it is in his keeping; and ‘feloniously’ means with a deliberate intent to do a wrongful act. It is true, the indictment here charges that the embezzlement was done with ‘the intent then and there to injure,’ etc., but *this does not express precisely the same meaning as ‘feloniously,’* because in the latter the element of deliberation is embraced. There would be no tautology in using both expressions.”

(5) The indictment is defective because it does not state that the abstraction was made “without the knowledge and consent of the board of directors of the First National Bank of Roseburg.”

The charge contained in each count of the indictment that the abstraction and conversion were "without the knowledge and consent of said national banking association" is indefinite, uncertain, and unintelligible.

In *United States vs. Martindale*, 146 Fed. 280, 283, 284, an indictment of the president of a national bank for a violation of the provisions of Section 5209, R. S., the Court said:

"Be this as it may, there is a fatal objection to this count in that it does not allege that the transaction in question out of which the draft was issued, was without the knowledge and approval of the *board of directors*, or the discount committee of the bank. The allegation of the indictment is that it was a misapplication 'of the moneys, funds, and credits of said association, without the knowledge and consent thereof.' It has been the understanding of the law of pleading in such indictments ever since the ruling of the Supreme Court in *United States vs. Britton*, 108 U. S. 193-197, that it must be alleged that the note, placed in the bank as the basis of the fund drawn out by the check or draft should have been discounted or received without the knowledge or approval of the board of directors or governing discount committee. In *United States vs. Britton*, 108 U. S. 193-197, the Court said: 'This count does not charge that the note of the defendant was discounted at his instance, without the authority of the board of directors.

"The pleader in this case recognized the obligation, in drawing the indictment, to charge that the transaction had 'passed muster' without the proper authority, and he therefore alleged that it was done without the knowledge of the association. The term 'association' is generic. It may comprehend the whole body of men, like the stockholders, who unite in forming the body politic of a banking institution; in which sense the allegation of the indictment might be true when the board of directors or the governing committee had not passed upon the transaction. As it is recognized usage and fact that the daily discounts and transactions of this character in a national bank are conducted by and through discount committees, *the indictment*, as applied to the instance of this count, *should negative the knowledge and approval of the recognized body for passing on such transactions. In criminal proceedings the rule strictissimi juris obtains. Nothing can be left to inference or implication. . . .* This proposition evidently was present to the mind of Judge Taft in his charge in *United States vs. Youtsey*, 91 Fed. 868, 869."

In *United States vs. Youtsey*, 91 Fed. 864, 870, Circuit Judge Taft, charging the jury in a case in which the defendant had been indicted for a violation of Section 5209, R. S., said:

"The principle on which rests the requirement that the Government shall show that there was no consent by the board of directors to the defendant's acts before conviction is that one

cannot steal what is given him, and cannot embezzle that which his principal consents that he may take. The question here really is, did the bank consent, *by its governing board or its exchange committee*, to the acts of Youtsey which are charged to be criminal, before they were done, or at the time? If so, then he cannot be held on these charges."

(6) The indictment does not allege in manner sufficient in law :

(a) That The First National Bank of Roseburg was a national banking association organized under the laws of the United States;

(b) That the bank was doing business at the City of Roseburg, Oregon, at the time of the offense charged; or

(c) That the bank was situated in the District over which the Court had jurisdiction.

The language of the indictment, "theretofore duly organized and established and then and there existing and doing business at the City of Roseburg, in the County of Douglas, within the State and District aforesaid, under the laws of the United States," *is a mere recital and not an allegation of fact*. It is one of the most ancient and well-settled principles of pleading that an indictment must state positively and affirmatively, and not by way of a mere participial phrase or recital or by implication, all the essential

elements necessary to constitute the offense charged. 2 *Hawk.*, P. C., c 25, s. 60; *R. vs. Whitehead*, 1 *Salk.* 371; *R. vs. Cowhurst*, 2 *Ld. Raym.* 363; *R. vs. Goddard*, 3 *Salk.* 171.

In *United States vs. Hess*, 124 *U. S.* 483, 484, the Court said:

“The statute upon which the indictment is founded only describes the general nature of the offense prohibited; and the indictment in repeating its language, without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be joined for submission to a jury. The general, and with very few exceptions of which the present is not one, the universal rule on this subject, is, that all the material facts and circumstances embraced in the definition of the offense must be stated or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially, *or by way of recital.*”

In *Axtell vs. State*, 173 *Ind.* 711, an indictment for embezzlement of funds of a building and loan association under an Indiana statute, the Court said:

“The first count, omitting formal parts, is as follows: ‘That Harry A. Axtell, late of said county, on September 14, 1907, at said county and State aforesaid, *being then and there an*

officer, agent and employee of the real estate, building and loan fund association of Bloomington, Indiana, which said real estate, building and loan association was then and there an association theretofore organized under the laws of the State of Indiana, which said association was then and there carrying on the business of receiving on deposit moneys and loaning the same, and receiving moneys in payment of said loans at the city of Bloomington in said county and State, said Harry A. Axtell, then and there had access to, control and possession of a certain sum of money, to-wit, the sum of \$700, of the value of \$700; said Harry A. Axtell then and there had access to, control and possession of said sum of money by virtue of and because of his then and there being an officer, agent, and employee of said real estate, building and loan fund association as aforesaid to the possession and ownership of which said real estate, building and loan fund association was then and there lawfully entitled, and said Harry A. Axtell did then and there unlawfully, feloniously, willfully and fraudulently take, purloin, secrete, and appropriate to his own use said sum of money aforesaid, contrary,' etc. . . .

“Appellant insists that this count fails to charge a public offense, for two reasons: (1) because it contains no direct averment of a confidential relation between appellant and the loan association, and (2) because it contains no averment that appellant, at the time of the alleged wrongful act, was entrusted by the loan association with the money he is alleged to have

embezzled. The consideration of these points naturally blends, and they will, therefore, be considered together.

“To start with, it should be borne in mind that the basic difference between the crime of larceny and that of embezzlement is that the former is predicated upon the wrongful taking of property with intent upon its conversion, and the latter upon a wrongful conversion of property rightfully in possession. The former may take place among strangers, while the latter can only be consummated in cases where, by virtue of a special confidential relation, the defendant has been entrusted with access and possession. Larceny and embezzlement chiefly differ in the manner of obtaining possession, and to enable the court to distinguish the particular offense proved, and to test the legal sufficiency of the charge, as well as to avoid a subsequent conviction for the same offense, it is highly essential that whatever circumstances or facts are necessary to constitute the offense imputed must be averred positively and unequivocally. Such has always been the law with respect to indictments generally. 1 *Chitty, Crim. Law*, 231; *Starkie, Crim. Pl.* 73; *Bishop, Crim. Proc.* (4th ed.) Sec. 554, (citing several cases.)

“A crime must be expressed positively and not with a ‘that whereas’ or *by way of recital*. Matter of inducement may be stated by way of recital, but the charge must be alleged in express and positive language. 1 *Chitty, Crim. Law*,

231. The certainty required in an indictment, in addition to a definition of the crime, is a clear and positive statement of the offense. *A charge cannot be preferred by way of recital.* A material fact stated only by way of recital is fatal on motion to quash. *Dillon vs. State, supra.*

“Again, referring to the same subject, we said in the case of *Terre Haute Brewing Co., vs. State, supra*, that, ‘*the facts constituting an offense must be affirmatively averred, and not introduced by way of recital.*’

“It was held in *McLoughlin vs. State* (1873), 45 Ind. 338, that *even the legislature cannot dispense with the necessity of setting out the facts constituting a crime.*

“In the light of the foregoing principles, we direct attention to the averments of fact contained in the first count of the indictment. It contains no allegation whatever that appellant, at the time of the alleged conversion, was an officer, agent, or employee of the loan association.

“*The clause ‘being then and there an officer, agent and employee’ of the building and loan association is but a recital, and is not equivalent to a direct and positive averment of the fact. The participial phrase merely states a condition, and not a fact, and at best leaves in the mind of the court an element of doubt, whether the relationship recited as existing between appellant and the prosecuting witness was such as to make appellant’s access to and possession of the money within the scope of duties he was employed to*

perform, or whether such official agency or employment merely afforded appellant an opportunity to take it, as might reasonably arise were he but a director, a clerk, or janitor of the association.

“If the charge had been in substance that appellant was then and there an officer, agent and employee of said association, and by virtue of his said office and employment he then and there had access to, control and possession of \$700 in money, to the possession of which money said association was then and there entitled, and said appellant while then and there in said office and employment, and in possession and control of said money by virtue thereof, did then and there feloniously, etc., our question would have been of a very different character. . . .

“It will be noted that the (other) allegation is that appellant had possession by virtue of his being an officer, agent and employee. Can any court determine from this averment, with reasonable certainty, whether the pleader meant to charge, merely, that by virtue and because of his being an officer, etc., the way to the money was open to him? Or that the duties of the appellant’s position embraced the access and possession? Or, in other words, can a court determine from the averments whether the crime imputed is embezzlement or larceny within the rule prescribed in *Vinnedge vs. State*, supra? *The expression employed is an apt illustration of the vice of pleading by recital and indirection in cases like this.*

“The first count of the indictment is clearly insufficient. Like infirmities exist in each of the other three counts, and for like reasons each is bad.”

(7) *The charge that the money was abstracted and converted “to his, the said Thomas R. Sheridan’s own use, benefit and advantage, AND to the use, benefit and advantage of one B. C. Agee,” is ambiguous, uncertain, and unintelligible, because it does not allege what part, if any, of the money was converted to the defendant’s use, and what part, if any, to the use of Agee.*

This objection carries its own argument. The defendant has a right to be advised, by indictment, of the contention of the government.

(8) The indictment is bad because it charges two separate and distinct offenses in each of counts Nos. 1 and 4.

Each of those counts charges that the defendant did “willfully and unlawfully abstract and convert *AND cause to be abstracted and converted,*” the money described. The first offense charged is unlawful abstraction and conversion; *the second offense is willful misapplication*, that is, “did cause to be abstracted and converted.” The defendant is entitled to know whether he is charged with having personally abstracted and converted the money, or whether he is charged with having induced or “caused” some other person to abstract and convert the money,

which latter offense is peculiarly the one intended to be denounced by Congress by the use of the term willful misapplication.”

Furthermore, even assuming for purposes of argument, that two distinct offenses may be joined in one count of an indictment, each offense would have to be fully set forth; but the offense of willful misapplication is not fully described in this indictment because it does not *particularly* allege the means by which the willful misapplication was made, which means have been repeatedly held by the United States Supreme Court to be an essential element of that offense, (*Evans vs. United States*, 153 U. S. 584).

(9) The phrase in the indictment “with the intent to injure and defraud the said national banking association *AND* said depositor and creditor therein” is ambiguous, unintelligible and uncertain, and repugnant to the other material allegations of the indictment.

From the description of the ownership of the property charged to have been abstracted, it is clear that if there were an intent to defraud it must necessarily have been an intent to defraud the depositor whose property is alleged to have been abstracted. Or if the property be regarded as property of the bank, if there were an intent to defraud it must have been an intent to defraud the bank. There could not have been, under any construction, an intent to defraud both the bank and the depositor.

(10) If the property described in the first and fourth counts of the indictment be regarded as the property of the depositors named therein, then the indictment is defective, because it does not allege that the property was abstracted “without the knowledge and consent of *said depositors*.”

The indictment merely alleges that the abstraction was made “without the knowledge and consent of *said national banking association*.”

It is elementary that to constitute an “unlawful taking” it must be proved as an essential element that the defendant took the property out of the possession of the owner without his consent, and that fact must be charged in the indictment.

(11) The indictment does not describe any property which is of such a nature that it can be “unlawfully abstracted and converted,” within Section 5209, R. S.

(a) If the money was the property of the depositor, then the abstraction of it was not within the prohibition of Section 5209, R. S. (See Pont No. 1, *supra*.)

(b) If the money was the property of the bank, then there is no description whatever of the money charged to have been abstracted, the only property described being a mere debt—a chose in action—of the bank to the depositor, which is incapable of “abstraction.”

(12) The indictment charges, not “unlawful abstraction and conversion,” but that money was obtained by the defendant under false pretenses, which is not an offense against the United States.

(a) The indictment charges that the abstraction was “by means of a certain instrument designated as a memorandum check.” When a check or order is presented to a bank for payment, the bank gives the title and possession of the amount of money named in it to the person presenting it. Therefore the person presenting the check does not “abstract” or “take” the money. It is voluntarily given to him. The defendant, therefore is charged, not with “abstracting,” but with using means to induce the bank to “give” the money to him. Consequently, the charge that the money was obtained *by means of a “memorandum check”* shows conclusively that it was not “abstracted.”

(b) The indictment charges that the money was abstracted “with intent to defraud.” In fraud a person is induced to voluntarily part with the title and possession of his property; the property is not “abstracted” from him. Therefore, since, according to the indictment, the defendant intended, not to “abstract” the money, but to induce the owner to voluntarily give it to him, the defendant did not have the intent necessary to constitute an “abstraction.”

(13) The indictment does not charge that the bank or the depositor has suffered any injury, be-

cause it does not charge that the memorandum check was not as valuable as the money charged to have been abstracted by means of it. If the memorandum check was not drawn on the account of the depositor named in the indictment, it was a negotiable instrument which might be of as great value as the money abstracted by means of it. Therefore the indictment is bad because it does not charge that the check was of no value or not of equal value.

There can be no crime unless an injury has been suffered, and therefore an indictment should charge positively and clearly the facts showing the injury.

ARGUMENT

The Evidence Does Not Support, and is at Variance With the Charges in the First and Fourth Counts of the Indictment.

I. The evidence shows that the relation of the bank to the depositors was that of debtor and creditors, and that the bank did not hold any money "for the sole use and benefit" of any depositor.

The Court below charged the jury as follows:

"But if you are satisfied beyond a reasonable doubt that he (the defendant) had no authority from the depositor to withdraw the funds, and if you further find that he had no

reasonable cause to believe and did not in good faith believe that he had such authority, then his abstraction of the funds was wrongful, and the crime is complete if you find that the abstraction was made with the intent to injure or defraud either the banking association or the depositor. (Tr., p. 234). . . .

“It is presumed that every person intends the natural and ordinary consequences of his own acts. Applying this rule to the case at bar, if you should find from the evidence beyond a reasonable doubt that the defendant without authority took from the accounts of his depositors named in the indictment, without previous authorization from them, *their* money and converted the same to his own use and benefit, and thereby placed the same beyond the control of said depositors, you would be justified then in presuming that he did these acts with intent to injure and defraud said depositors.” (Tr., p. 237.)

The defendant requested the Court to charge the jury as follows:

“I also particularly except to the Court’s refusal to instruct the jury in accordance with defendant’s requested instruction No. 5, that an officer of a National Bank who has full charge of making loans on behalf of the bank, has a right to lend any portion or all of the money deposited in the bank by depositors on general checking accounts without first obtaining permission from the depositor or depositors to do so.” (Tr., p. 243; also see Assignment of Error No. XXVIII., Tr., p. 267.)

In *Marine Bank vs. Fulton*, 2 Wall. 252, 256, Mr. Justice Miller, delivering the opinion of the United States Supreme Court, said:

“All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money *peculiar to banking business*, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it *for his own profit*, agrees to refund the same amount, or any part thereof, on demand. . . . It would be a waste of argument to prove that this was a debtor and creditor relation.”

See also:

First Nat. Bank vs. Lanier, 11 Wall. 369, 375;

Thompson vs. Riggs, 5 Wall. 663, 678;

Burton vs. U. S., 196 U. S. 283;

Bellew vs. U. S., 160 U. S. 187;

Leather Mfgs. Nat. Bk. v. Merchants Nat. Bank, 128 U. S. 26, 34;

Planter's Bank vs. Union Bank, 16 Wall. 483;

Manhattan Co. vs. Black, 148 U. S. 412;

County Bank vs. Massey, 192 U. S. 138, 145.

In *United States vs. Youtsey*, 91 Fed. 864, Circuit Judge Taft, in charging the jury, said:

“You are all doubtless sufficiently familiar with the business of banking to know that it consists chiefly of receiving money on deposit, subject to check, and of lending out at interest, not only the money paid in as capital by its stockholders, *but also a large part of the amounts received from its depositors, retaining on hand enough to meet the checks which the depositors are likely to present in the ordinary course of business.* The amount required to be retained on hand for this purpose by national banks is called a ‘reserve.’ Another rule laid down in the banking act is that the total indebtedness of any person or firm to national banks shall not exceed one-tenth of the capital stock of the bank. . . . As already stated, violations of these rules are not punished as crimes, but it is left to the Comptroller to enforce them by an exercise of the supervisory power entrusted to him by law.”

In *Michie on Banks and Banking*, Vol. 2, p. 883, Sec. 119, it is said:

“Ordinarily the relation between a bank and its depositor is that of debtor and creditor, and not that of agent and principal, bailor and bailee, or trustee and cestui que trust, unless the moneys deposited are public funds or funds held by the depositor in a fiduciary capacity, knowingly accepted by the bank. This is equally true of private banks, deposits in savings banks, and deposits arising from collections made for a correspondent bank.” (Citing a great number of cases.)

“Where a party confides a sum of money to another, who is to return to him, upon demand, a like sum, and not the identical money, the transaction is a simple deposit. If any other terms or conditions enter into the contract, it does not assume the character of a deposit. If the sum cannot be withdrawn, at the pleasure of the creditor, but is to remain for a certain period in the hands of the debtor, it becomes a gratuitous loan. If it is to be repaid with interest it becomes a loan upon interest.” (p. 887.)

In *Burton vs. United States*, 196 U. S. 283, 297, the Court said:

“The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check, which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant’s account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank for it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up or thrown it into the fire or made any other use or disposition of it which it chose, and no right

of defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of the bank when a check was paid, of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more."

The evidence shows very clearly that the United States Attorney and all the depositors who testified on behalf of the Government, as well as the Court itself, made the grievous mistake *of assuming that the general checking accounts of the depositors consisted of specific moneys "held by said National Banking Association as a deposit for the sole use and benefit of one David Hull, (and the other depositors mentioned), a depositor and creditor of said The First National Bank of Roseburg,"* (Indictment, Tr., p. 7,)—instead of mere debts—chosen in action—of the bank to the depositors—and consequently that the bank or its agents would have to obtain specific authority from the depositors in order to lend the money deposited by them to third persons and thus have the money earn interest for the benefit of the bank. As virtually the only profit or income which men who organize and conduct a national bank derive from the bank is the interest which it receives for itself on loans which it has made of money that has been deposited with it, without first asking permission of the depositors or making them parties to the

loans, it is almost inconceivable that such a mistake could have been made. It is elementary that when a person deposits money with a national bank on a general checking account he *by that act gives the bank the full legal title to the money and full authority to lend the money which he has deposited to whomsoever it pleases*, or invest it in any manner it pleases for its own benefit. The depositor in such a case looks solely to the credit of the bank for the payment of its debt to him on demand, that is, upon his drawing a check or order on it. If the depositor wishes to obtain interest on the amount of money he has deposited, he must have his general checking account—that is, his loan to the bank payable on demand—cancelled, and a “time” deposit created or a so-called certificate of deposit issued in his favor—that is, make his loan to the bank payable only at the expiration of a specified period.

Viewing the rights of the depositors in this case as, not rights to specific moneys which they have deposited in the bank, but as mere choses in action against the bank, which is the demonstrably correct view, the facts shown by the evidence divide themselves into two groups, neither of which is in any way connected with or related to the other, and neither one nor both of the groups states or constitutes the offense against the United States charged in the indictment, or any offense against the United States.

The first group of facts is as follows:

(1) The president of a national bank attempted to change a debt of the bank from a debt payable on demand into a debt payable at the expiration of a specified period; that is, he attempted to change a depositor's general checking account into a "time" deposit. The only acts constituting the attempt were:

(a) The making of an entry on the books of the bank that the debt due from the bank to the creditor was not payable on demand. Debts of the bank payable on demand are entered in the books of the bank as general checking accounts. Therefore, in order to cancel the creditor's general checking account, a memorandum check or charge slip was drawn against the account.

(b) The making of an entry on the books of the bank that the debt due from the bank to the creditor was payable at the expiration of a specified period. Debts of the bank payable at the expiration of a specified period were usually required to carry interest in favor of the creditor, and were ordinarily evidenced by a certificate of deposit or other form of promissory note signed by the bank and payable to the creditor or depositor. Therefore a promissory note was executed by the president in favor of the depositor.

The creditor did not consent to the change, and therefore the attempt to change the time of payment of the debt was ineffectual.

(As the defendant was the managing agent of the bank, his personal note—that is, signed with his initials—was the note of the bank, and that he himself, as well as the depositors, so regarded it, is shown by the fact that, as testified by the depositors, he executed his personal notes in those instances where it clearly appears from the circumstances that he could not possibly have been personally interested, and in which the bank unquestionably received all the interest not paid to the depositors.)

The second group of facts is as follows:

(2) A national bank through its board of directors appointed its president as its managing agent. The president was entrusted with possession of the money of the bank for the purpose of lending it, at the president's discretion, to third persons, and he was also given possession of the bank building in which the money was situated. The president, through servants appointed by him, kept a book in the bank building in which he kept a record of his transactions with third persons on behalf of the bank, and also of the current financial transactions between himself and the bank, there being a daily interchange of debits and credits on the books between himself and the bank. The president entered a credit of a certain amount in his own favor in that part of the book in which a record was kept of the transactions between himself and the bank. He also entered a credit of a certain amount in favor of a third per-

son in whose business he was interested. No money or other property was removed from the bank building either by himself or anyone because of such credit entry having been made, or at all, nor were any checks drawn against such credit entries, nor had the bank become obligated in any way or to any extent as a result of such credit entries having been made.

Regarding the first group of facts above-mentioned: It should be borne in mind that the evidence shows clearly that when the depositors asked the bank to pay them interest on the amounts of their deposits, its president told them that it would if they would change their deposits—their call loans to the bank—into time loans, the bank would pay them a part of the interest received by it from lending their money. In other words, rather than have the depositors withdraw the money from the bank so that the bank would not receive any interest on it, the bank would give the depositors a part of the interest if they would permit it to remain in the bank. *Exactly the same transaction occurs several times daily in every National Bank in the United States in issuing the ordinary "certificate of deposit."* A depositor in any National Bank who does not intend to check out before some distant day the amount of money that he has deposited, ordinarily calls at the bank and has issued to him a "certificate of deposit"—which is, in effect, a promissory note of the bank payable at a certain rate of interest in thirty

days or at some other definite time—which prevents the depositor from withdrawing the amount of money he has deposited with the bank before the date fixed. In other words, in consideration of the relinquishment by the depositor of his right to withdraw at any time the amount of money that he has deposited, and his promise to not withdraw it before a distant future day, the bank agrees to pay to the depositor a part of the interest which it receives from lending his money, because under those circumstances it will not be required to retain cash in the bank as a reserve to cover the possibility of an immediate withdrawal by the depositor of his money without prior notice to the bank.

The only differences between the “certificates of deposit” issued by all national banks in our large cities and the promissory notes executed by defendant to the depositors who testified in this case, and placed under the proper index file in the vault of the bank are:

1. (a) Because of the vast number of loans made by the national banks in the large cities, a certificate of deposit issued by them is for an arbitrarily fixed period—such as thirty days—and its period does not correspond with the period of the loan which is made to a third person of the amount of money thus lent to the bank for a definite period by the person to whom the certificate of deposit is issued;

(b) Because of the comparatively small number of loans made by the bank of which the defendant was president, it was very easy to make the promissory note of the bank to the depositor payable at the same time that the loan made by the bank to the third person would mature, and thus the bank would be enabled, if the depositor should wish to then withdraw the amount of money due him, to pay the depositor the money which it would have just received from the third person, without in any way affecting the cash reserve in the bank; and

2. (a) The "certificates of deposit" issued by the large national banks are delivered by the bank to the person in whose favor they have been issued;

(b) Because of the intimate personal relations between the defendant and the depositors who have testified in this case, and his unquestioned financial standing and personal character, together with the fact that the number of loans made by the bank was comparatively small, the defendant's promissory notes on behalf of the bank to the depositors were not requested by the depositors to be delivered to them, but were put in the securities file of the bank under the proper index letter for the depositor's name.

The defendant was clearly acting for the best interests of the bank, and was exercising good banking policy, in converting the account of Mrs. Verrell from a demand deposit into a time deposit and thus

enabling her to receive interest on the amount of money deposited, because she had intimated to the defendant that she might withdraw the money from the bank for the purpose of making an investment, and if that were done the bank would lose the privilege of using her money. By changing the form of her account and paying her interest the defendant caused any pecuniary motive she would have in seeking an early investment outside the bank to cease to exist.

II.

The evidence demonstrates that no money was ever abstracted "by means of a certain instrument designated as a memorandum check."

There is no evidence whatever that when the memorandum checks were received by the bank, or at the time when the memorandum checks were charged against the depositors' accounts, or at any time, any moneys, funds or credits were taken or abstracted or removed from the bank in any way by means of such memorandum checks.

The evidence shows conclusively that (Tr., p. 66) on March 4, 1911, a deposit slip—not a memorandum check—was filed by means of which a credit of \$230 was given to B. C. Agee, and that (Tr., p. 66) on March 7th, *three days afterwards*, the memorandum check was received by the bank and charged against the depositor's account. Therefore the credit

could not possibly have been caused or obtained by means of the memorandum check.

III.

The evidence does not show the *corpus delicto*, that is, that any moneys, funds or credits have been abstracted or converted.

The situation shown by the evidence is as follows (assuming for purposes of argument that the defendant was not the managing agent of the bank) :

A certain person keeps a book in which he has entered the names of his creditors and the amount due each of them. Another person, without the knowledge of the owner of the book, causes one of the latter's servants to increase the amount shown by the book to be due a certain creditor. Nothing further is done. *Quaere*: Has any money or other property been "taken" or "abstracted" from the owner of the book?

(a) The evidence regarding the first count of the indictment is that the defendant by means of a *deposit slip* caused a credit of a certain amount to be entered in one of the books of the bank to the credit of B. C. Agee.

The evidence regarding the fourth count is that a credit was entered in defendant's account. It is not shown that the defendant entered the credit or caused it to be entered. The evidence is merely that it "was" entered.

There is no evidence that any check was ever drawn against either of those credits, or that any money, fund or credit was ever abstracted or obtained in any way by defendant or Agee or anyone else because of or through such credit or credits having been given. There is no evidence that any money, fund or credit has ever left the possession or control of the bank, either because of such credits or otherwise. There is no evidence that at any time the bank has been "short" in its moneys, funds or credits on hand, or that it has become obligated in any way because of those credits.

In United States vs. Martindale, 146 Fed. 280, 285, the Court said:

"This count (the fourth) charges misapplication of the funds of the bank, growing out of a draft drawn by the Excelsior Water Mill Company for \$5,000 on the defendant, in favor of the Burlington National Bank, with the allegation that said draft was paid out of the moneys, funds and credits of said Emporia Bank to the Burlington Bank by the defendant and said Davis by making and causing to be made a deposit slip in the words and figures as follows: 'First National Bank of Emporia, Kansas. Deposited for account of Burlington Nat. 7-17-97. \$5,000. W. Martindale,' who made and caused to be made by one ———, whose name is to the grand jury unknown, a clerk in said bank, in a book used by said association, and designated as the cashbook, a certain

entry to the credit of the Burlington National Bank: 'July 17, 1897. Burlington Nat. Martindale, \$5,000.' That afterwards said Burlington National Bank drew from the funds of said First National Bank the sum of \$5,000, so placed to its credit as aforesaid; the defendant and said Davis knowing that said Excelsior Water Mill Company and the defendant had no moneys, funds or credits in said First National Bank to pay said draft, and that said association received no consideration for the same, and that the same was without its knowledge and consent, the defendant and said Davis then and there fraudulently devising that the said Burlington National Bank, the Excelsior Water Mill Company, and the defendant should obtain possession of said \$5,000 for the use and benefit of said Excelsior Water Mill Company and the defendant.

"This count is subject to the objection designated respecting the first count, that the transaction is not alleged to have been without the knowledge or approval of the board of directors or governing committee.

"It is furthermore apparent from a careful reading of this count that it proceeds upon the theory that the misapplication was in entering a credit to the Burlington National Bank of the sum of \$5,000, the same as if it had been deposited by the defendant in cash. *The entry was not a misapplication of the funds, but the wrong would consist in withdrawing the money from the bank.* The only allegation of the in-

dictment in this respect is, 'that afterwards said Burlington National Bank drew from the funds of said First National Bank the sum of \$5,000 so placed to its credit. There is no allegation as to when this was done, or that there was any wrong or fraud in withdrawing the money; nor is there any negation that any additional consideration may have been given by the Burlington Bank at that time. Neither is there any allegation of any loss of this money to the bank. The only statement is that at some time after July 17, 1897, the Burlington Bank drew the sum of \$5,000. Whether or not this was ever lost or paid, or sufficient security therefor given, is nowhere alleged. As shown in the previous discussion, *it is essential to show a loss*. As said in Britton's case, *supra*, the discount may have turned out to be a benefit to the association, for there is no averment that the note was not paid at maturity, or that the association suffered any loss by reason of this discount. As heretofore stated, as held in the Dow case, *a mere entry in the books of the association did not constitute a misapplication, but as the crime was committed and consummated only when the money was drawn from the bank, it must follow that the indictments must show that the money got out of the bank in some way*. . . . This count (the seventh) charges a misapplication in that there was deposited to the defendant's credit on April 1, 1898, the sum of \$5,000. It is quite evident from reading the specifications of this count that *it was in the mind of the pleader only to charge the completion of the misapplication by the fact of entry in the books of the bank, and*

not in the withdrawing of the funds. There is no showing when or under what circumstances the money was drawn from the bank, nor is there any loss directly alleged to have occurred. The count is also subject to the objection discussed in respect of the first count of the indictment for a failure to allege that the transaction was without the knowledge or approval of the board of directors or discount committee. . . .

“The count (the eighth) proceeds evidently upon the theory that the misapplication consists in the entry in the account, and not in drawing out the money of the bank. Neither does it show how, when, nor the circumstances under which the money was drawn from the bank, nor does it appear that the money was lost to the bank.”

In *Dow vs. United States*, 82 Fed. 904, 906, (C. C. A.—8th Ct.), the Court said:

“The jury were instructed that the fact that Miller received credit in his account on the books of the bank for checks drawn on that bank or on other banks constituted a flagrant misapplication of the funds of the Commercial National Bank, within the meaning of Section 5209; yet it is apparent that merely giving credit to Miller on the books of the bank for the amount of the checks did not lessen the funds held by the bank, nor in fact defraud the association in any form. To complete a misapplication of the funds of the bank, it was necessary that some portion thereof should be withdrawn from the possession or control of the bank, or a conversion in

some form should be made thereof, so that the bank would be deprived of the benefit thereof. It is not necessary in all cases that the money should be actually withdrawn from the bank. Thus, if by connivance between a bank official and a customer of the bank, the latter is allowed to draw checks on the bank, when the drawer has not the funds to meet the checks, and the same are given by the drawer to third parties in payment of claims to them, the third parties instead of getting the cash on the checks, have them credited up to their accounts in the bank, this completes the misapplication of the funds of the bank, because the bank has become bound for the payment of the sums thus credited to the third parties; and the result is just the same as though the holders of the checks had obtained the money thereon, and had subsequently deposited it to their credit. In such cases the funds of the bank would be lessened and thereby the criminal misapplication might be completed. *If, however, the customer presents the checks himself and has the same credited on his account the crime of misapplication is not completed thereby, because the bank is not under legal obligation to pay out any of the amounts wrongfully credited to the customer, and may refuse to pay checks drawn against the inflated account, and may at any time charge back against the customer the amounts of checks. . . . To complete the criminal misapplication of the bank funds in the supposed case, some sum must be paid by the bank to the customer, or to third parties on his order, or must be credited to third parties under such circumstances that the bank*

becomes bound for the payment thereof. If the jury had been instructed that, if the evidence showed that Dow, as president of the bank, had knowingly permitted Miller's account with the bank to be inflated by crediting him with large amounts of false or fictitious checks, or checks drawn by parties who had no funds in the bank against which to draw, and Dow had furnished Miller with certified checks on the Commercial Bank, or had otherwise permitted him to draw large sums from the bank, so that in fact the funds of the bank had been depleted or withdrawn, and this was done under circumstances showing an intent on the part of Dow to defraud the bank by thus allowing its funds to be depleted, a case of misapplication of the funds, within the meaning of the statute had been made out, no just exception could have been taken thereto. The positive instruction, however, that merely crediting up on Miller's account the checks in question amounted to a misapplication of the funds of the bank within the meaning of the statute, was clearly contrary to the construction placed on the statute by the Supreme Court, and we are compelled therefore to sustain the exceptions taken to the several parts of the charge, wherein it was stated that the reception and crediting of the checks on Miller's account constituted a violation of the statute; and as these parts of the charge were directed to the very gravamen of the counts charging a misapplication of the funds, the error therein was material and necessitates the granting of a new trial in the case."

In *Mohrenstecher vs. Westervelt*, 87 Fed. 157 (C. C. A.—8th Ct.), the Court said:

“To constitute a misappropriation there would have to be a conversion of the funds of the bank in some form to the use of the cashier, or some person other than the bank, with the intent to injure and defraud the bank. . . . The burden was upon the plaintiff to show that Mohrenstecher by means of these notes wrongfully obtained money from the bank. *If by executing the notes and delivering them to the bank, he was either paid or took money from the bank, that fact was capable of proof by showing the reduced amount of the cash on the day it was taken.*”

In *Agnew vs. United States*, 165 U. S. 36, it was said:

“A charge that if the defendant either embezzled or willfully misapplied the funds or credits of the bank, ‘whereby as a necessary, natural or legitimate consequence *its capital was reduced or placed beyond the control of the directors, or its ability to meet its engagements or obligations or to continue its business was lessened or destroyed*, the intent to injure or defraud the bank may be presumed,’ is correct.”

III. (b) The evidence merely shows that “by means of a certain instrument designated as a memorandum check” the defendant made an ineffectual attempt to change debts of the bank from debts payable on demand to debts payable at the end of a speci-

fied period. No property was abstracted from the bank or from the depositors or from anyone because of such attempt.

III. (c) There has been no "conversion" because neither the bank nor the depositors can sue the defendant or Agee for conversion.

As stated by Judge Hough in *United States vs. Heinze*, 183 Fed. 907, an indictment for a violation of Section 5209, R. S.:

"Could the bank have maintained an action for conversion against the respondent of the discount proceeds under the facts stated? I think not, and am therefore of opinion that counts fourteen and fifteen are demurrable."

In *United States vs. Morse*, 161 Fed. 429, 435, an indictment for the willful misapplication of funds of a national bank, the Court said:

"Conversion is a technical term, and it is a fair question: Could the bank have maintained an action sounding in tort against Morse for this \$126,000, directly it was paid out, assuming ability to prove the above-recited allegations? I think it could, and, if so, the conversion is sufficiently alleged."

The bank could not have maintained an action of conversion in this case because no property had been taken from it, nor had it become obligated to any extent.

Even assuming, for purposes of argument, that the accounts of the depositors in this case were special deposits of particular moneys held by the bank for their sole use and benefit, the depositors could not have maintained an action for conversion because there is no evidence that any of that money was taken or "abstracted" either from them or from the bank. In other words, the evidence does not show that there has been a violation of any right of either the bank or any of the depositors or anyone, or that the defendant has done any act or acts from which anyone has suffered any injury. *If the accounts were general checking accounts, then, so far as the depositors are concerned, all the defendant has done has been to attempt to change a debt due each depositor from a debt payable on demand to a debt payable at the end of a specified period, which attempt was clearly ineffectual to any extent.*

It is elementary that in every case, civil and criminal, the cause of action depends upon the violation of a right, and not on the motive or intent with which an act which does not violate a right is done. Clearly no right has been violated in this case. Considering the leading case which defined this principle, the Court, in *Quinn vs. Leathem*, 1901, L. R., A. C., 495, 508, said:

"The headnote to *Allen vs. Flood* (1898), A. C. 1, might well have run in the words used by Baron Parke in giving the judgment of a specially strong Court nearly half a century ago

(Stevenson vs. Newnham—1853—13 C. B. 297) : *‘An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.’* That, in my opinion, is the sum and substance of Allen vs. Flood if you eliminate all matters of merely passing interest.”

The board of directors of the bank could not have maintained an action for conversion against the defendant.

The president of a bank who has been entrusted by the board of directors with the management of the bank *has authority to do whatever the board of directors could have authorized him to do.*

In *Sun Printing, etc. Assn. vs. Moore*, 183 U. S. 642, 651, the Court said :

“As Lord (the Managing Editor) was charged with the full control of the business of collecting news and impliedly vested with power to enter into contracts with respect thereto, he was, in effect, a general officer of the corporation as to such matters, *and it is well settled that the president or other general officer of a corporation has power prima facie to do any act which the directors or trustees of the corporation could authorize or ratify.* *Oakes vs. Cattaraugus Water Co.*, 143 N. Y. 430, and cases cited. The burden was on The Sun Association to establish that Lord did not possess the authority he assumed to exercise in executing the contracts. *Patterson vs. Robinson*, 116 N. Y. 193, 200, and cases cited. As the trustees of The Sun Associa-

tion were unrestricted by the charter, and might have authorized Lord to execute the writings in question, and the association failing to refute the *prima facie* presumption, he must be held to have been vested with such power."

IV.

There are no facts shown by the evidence from which an intent to defraud—the *mens rea*—on the part of the defendant may be inferred.

A fraudulent intent may be inferred from willfully and knowingly doing an unlawful act. But no unlawful act is shown by the evidence. To constitute an unlawful act from which an intent to defraud may be inferred, there must be an obtaining of something for nothing or for a consideration of less value. A lawful abstraction of moneys of the bank might be made by defendant without the depositor's consent if he were authorized by the bank to abstract it. But as defendant was the managing agent of the bank he was authorized by the bank to abstract its money.

The severity of the punishment imposed by Section 5209, R. S., negatives the idea that mere technical violations are to be punished. *Folsom vs. United States*, 160 U. S. 122.

In *Agnew vs. United States*, 165 U. S. 36, 49, the Court said:

"The rule of law in regard to intent is that intent to defraud is to be inferred from willfully

and knowingly doing that which is *illegal, and which in its necessary consequences and results must injure another.*"

In *Hayes vs. United States*, 169 Fed. 101 (C. C. A., 8th Ct.), an indictment for violation of Section 5209, R. S., the Court said:

"The testimony has all been very carefully examined, and we fail to find anything indicating that this was a sham transaction in any other sense than that it was an accommodation note. There is no substantial evidence tending to show that Farmer was insolvent or unable to respond to the demand of the bank for payment of the note at any time, or that there was any understanding between him and the officers of the bank that he should not be held on the note if they should be unable to protect him from liability by paying it or taking care of it themselves. . . . While evidence, to convict of crime, may be circumstantial and inferential in its character, it must always rise to that degree of convincing power which satisfies the mind beyond a reasonable doubt of guilt."

In *Steinman vs. United States*, 172 Fed. 913, (C. C. A., 3rd Ct., decided Oct. 6, 1909), Circuit Judge Buffington, delivering the unanimous opinion of the Court, said:

"In the Court below E. H. Steinman was convicted on an indictment charging him, under Revised Statutes (U. S. Comp. Stats. 1901, p. 3497), with aiding and abetting Charles E.

Mullin, cashier of the Farmers and Merchants National Bank of Mount Pleasant, Pa., to willfully abstract the funds of said bank. On the imposition of sentence Steinman sued out this writ of error.

“The abstractions charged in the indictment consisted of overdrafts, previously sanctioned by the president and cashier of the National Bank, but not by its board of directors, of the Acme Lumber and Supply Company, of which the defendant was an officer, and the president and cashier of the bank were stockholders. In its charge to the jury the District Court said: ‘An arrangement by which the cashier and the president of a banking institution allow the funds to be taken out is not a justification, either on the part of the president and cashier or on the part of a person dealing with the president and cashier. The funds of national banking institutions can only be taken out by the action of the board of directors. . . .

“An overdraft of an account is not *per se* and necessarily an abstraction of the bank's funds under Section 5209 by the drawer of a check who has not funds to meet it. Nor is the payment of such overdraft check by an executive officer of the bank, without action by the board, necessarily a misapplication under such section. Indeed in Bolles on Modern Banking, p. 199, it is said: ‘Generally, two kinds of overdrafts are as clearly justified as any other kind of a loan: (1) an unintentional overdraft by a depositor in good standing, and possessing ample means

to pay; (2) an overdraft to be paid in pursuance of a prior agreement, resting on abundant credit.' It will thus be clearly seen that the facts and circumstances attendant upon an overdraft may affect the character of the overdraft and determine whether it is criminal and within the purview of Section 5209, which as we have seen concerns transactions where one 'embezzles, abstracts or willfully misapplies.' This is clearly shown in the cases involving that section before the Supreme Court. There the distinction is clearly drawn between acts of willful misapplication under Section 5209, and those of maladministration in violation of Section 5200 (p. 3494). For example, that 'the total liabilities of any association to any person for money borrowed shall at no time exceed one-tenth part of the capital stock of the association actually paid in, and which acts of maladministration shall, under Section 5239, (p. 3515), subject the bank to forfeiture of its charter. Thus in *United States vs. Britton*, 107 U. S. 655, the Court says: 'We are therefore of opinion that the willful misapplication of the moneys and funds of the banking association, which is made an offense by Section 5209, means something different from the acts of official maladministration referred to in Section 5239, and it must be a willful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association, or some other body corporate, or some natural person.'

“And in *United States vs. Northway*, 120 U. S. 327, it is said: ‘In the case of the *United States vs. Britton*, 107 U. S. 655, 669, the offense of willfully misapplying the funds of a banking association, as defined by the statute, was considered with reference to the facts in that case. It was there held that a willful and criminal misapplication of the funds, as defined by Section 5209, did not include every case of an unlawful application of funds, inasmuch as in the very statute itself there were other instances of unlawful misapplication, evidently not embraced within the intention of Section 5209. For that reason it was held, in that case, that it was necessary to specify the particulars of the application, so as to distinguish that charged in the indictment as willful and criminal from those others contemplated by the statute which were unlawful, but not criminal.’

“Now this distinction between an unlawful act of maladministration, which, of course, misapplied the funds of the bank and subjected the bank to forfeiture of its charter, but which is not punishable under Section 5209 as a willful misapplication, the Court in its charge failed to draw, but, on the contrary, instructed the jury that such an unlawful act of maladministration evidenced an intent which warranted conviction. The language was: ‘*If by the paying of these checks, or any of them, either the moneys of the bank were removed from the resources of the bank, or its capital reduced, or its charter endangered, any one of these things would be sufficient to warrant you in finding that the mis-*

application was with intent to injure the banking institution.'

"Under the facts there was really nothing left for the jury to pass on. Taking these overdrafts under the arrangement alleged, they were loans of more than one-tenth of the capital of the bank. *In paying the checks the moneys of the bank were removed from its resources, and that they as excessive loans endangered the charter of the bank were all matters which could not be gainsaid, and from them the jury were in effect directed to infer the intent necessary to a conviction under this indictment.*

"Such instruction, being at variance with the views expressed by the Supreme Court, we are of opinion that in this regard, as well as in ruling out the testimony mentioned, the defendant has just ground to complain, and *the judgment imposed must be reversed.*"

In *Prettyman vs. United States*, 180 Fed. 30, 34, (C. C. A., 6th Ct., 1910), the Court said:

"The conduct of Lettich, the cashier, in recklessly paying overdrafts, and that of Prettyman, the vice president, in insisting upon their accepting excessive accommodations for the Woolen Company, of which he was the chief executive officer, were most reprehensible and altogether lacking in faithfulness to the trust reposed in them by the stockholders of the bank, and merits the severest condemnation. And this is so whether or not all of that conduct shall turn out to include all of the elements of criminality

prescribed by the statute under which they were indicted. *But gross maladministration and inexcusable breach of duty on the part of its officers in the management of a national bank, however disastrous such conduct may be to its stockholders, are not punishable unless they come within the provisions of Section 5209, Revised Statutes.* The Supreme Court in *United States vs. Brewer*, 139 U. S., at page 288, although alluding to another enactment, announced the applicable principle when it said that: 'Before a man can be punished his case must be plainly and unquestionably within the statute.' "

"The question of fraud or no fraud is one necessarily compounded of fact and of law; and without a clear and precise knowledge of the facts from which the legal conclusion should be deduced, it is not easy to perceive how any legal conclusion can be reached." *Ogilvie vs. Knox Ins. Co.*, 18 How. 577, 581; *Wasatch Mining Co. vs. Crescent Mining Co.*, 148 U. S. 293, 298; *McLoughlin vs. Bank*, 7 How. 221, 228.

If any offense is established (and we contend none is) it is not "abstraction," but one of the following four:

VI.

(1) *If any offense is shown by evidence, it is embezzlement and not "unlawful abstraction."*

The evidence shows that the defendant, as managing agent of the bank and as an agent with power

to lend, had possession of the money charged to have been abstracted.

To constitute an unlawful abstraction or taking there must be at the moment of taking possession the intent to appropriate the property or to defraud the owner or any other person. But since at the time the defendant is alleged to have taken possession of the property charged to have been abstracted by him no such intention existed, but if formed at all was formed afterwards while the goods were in his lawful possession, an "unlawful abstraction" could not possibly have occurred. The offense in such case would be embezzlement. Evidence of embezzlement is insufficient to show the "unlawful taking" which is an element in larceny.

Section 5209, R. S., creates and prohibits the commission of three new offenses, unknown to the common law: (1) Embezzlement; (2) Unlawful abstraction; and (3) Willful misapplication—of moneys of a national bank by one of its officers with intent to defraud. Such acts before the statute and at common law were mere breaches of trust. The statute in effect provides that when officers of national banks shall be charged with embezzlement or larceny the *animus furandi*, or intent to convert and keep the property permanently, need not be proven, if a mere intent to defraud is shown. In other words, the statute merely modifies the extent or character of the wrongful intent required to be shown when officers of national banks are charged with embezzle-

ment or larceny, but it does not modify or change any of the other essential elements necessary to constitute embezzlement or larceny. Therefore, since the "unlawful taking," which is of the essence of larceny, has not been shown in this case, there can be no larceny or "unlawful abstraction."

The cashier of the bank testified that the defendant had full and exclusive power of lending the money of the bank, and that "Tom Sheridan and I ran this bank," the cashier's part in "running the bank" consisting of merely clerical duties. (Tr., p. 63). Therefore defendant as President had possession of the money at the time he is charged to have "unlawfully abstracted" it.

Abstraction is conversion to his own use by an officer of a national bank when the funds are not especially entrusted to his care. Dow vs. United States, 82 Fed. 904; United States vs. Youtsey, 91 Fed. 864.

Quaere: Who had possession of the moneys in the general fund of this bank? Inasmuch as the corporation could act or have possession of its property only through its agents, which of its agents had possession of its moneys? Certainly not the board of directors, because it had turned over to the defendant the possession of all the property of the bank with discretionary power of lending or otherwise disposing of its funds. Certainly not the clerks in the bank who were inferior to the defendant, because they

merely had the manual custody of the money. The defendant, being the president and actual manager of the business of the bank and of its property is the only person who can be said to have had possession of the moneys of the bank. Therefore if he converted the money he would be guilty only of embezzlement, and not of unlawful abstraction. The ownership of the moneys was in the corporation, but the possession, which is a physical fact exercisable only by a natural person, was in the defendant.

In Vol. 1, *Clark and Skyles on The Law of Agency*, Section 5, page 8, in discussing the distinction between an agent and a servant, it is said:

“The distinction which has generally been made is that the function of an agent is to enter into contract relations with third persons for and on behalf of his principal, and, usually, in that connection, to determine the mode of effecting the desired purpose without being under the direct control of the principal. That is, an agent does some act, in a manner suggested more or less by his discretion or judgment, *which has the effect to establish a contractual relation between his principal and a third person.* On the other hand, servants are persons who are employed by and are subject to the direction and control of the master, usually for a definite period and at fixed wages or salary, and whose duties require them to perform some service which does not result in a contract between the master and another.”

In *Huffcutt on Agency*, Sec. 4, it is said:

“The fundamental distinction between an agent and a servant lies in the nature of the act which each is authorized to perform. An agent represents the principal in the performance of an act resulting in a contractual obligation, or an obligation springing from contract relations. A servant represents the master in the performance of an act not resulting in a contractual obligation.”

In *United States vs. Youtsey*, 91 Fed. 864, 867, the Court said:

“Embezzlement is the unlawful conversion by an officer of the bank to his own use of funds entrusted to him, with intent to injure or defraud the bank. Abstraction and misapplication are a conversion to his own use by an officer of the bank of funds of the bank which are not especially entrusted to his care.”

In *United States vs. Cadwallader*, 59 Fed. 677, the Court said:

“Upon a careful consideration of the statute (Section 5209, R. S.) I am satisfied that it creates and defines several *distinct* offenses, *probably not less than nine*. It is true the punishment for each offense is the same, but that circumstance is not controlling in determining whether or not the offenses are one and the same, or distinct and several. If the evidence to establish one is of necessity entirely dif-

ferent from that which would be sufficient to establish another—if the indictment and prosecution and defense would be wholly different—then the offenses are not the same, but are distinct; and that this should be so seems quite clear. *The proof to establish a case of willful misapplication of funds, or an abstraction of the moneys or funds of the bank, would be inadequate to make a case of embezzlement.*”

There would be a true case of “unlawful abstraction” if a clerk of a bank should enter the bank after business hours at night and abstract or take money from the bank’s vault.

VII.

(2) *Or if any offense is shown by the evidence, it is “maladministration,” and not “unlawful abstraction.”*

The defendant was vested with the exclusive duty of lending the money of the bank, and in pursuance of that duty he necessarily had to *lawfully* “abstract” the money of the bank. If afterwards he lent it improperly he would be guilty only of maladministration, which is not an offense against the United States for which he would be personally punishable.

In *United States vs. Britton*, 108 U. S. 193, 196, the Court said:

“The gravamen of the charge (under Section 5209, R. S.) is that defendant, being presi-

dent and a director of the association, and being insolvent, procured to be discounted his own note, the same not being well secured, the payee and indorser thereof being also insolvent, which he, the defendant, well knew. The incriminating facts are that the note was not well secured, and that both the maker and indorser were, to the knowledge of the defendant, insolvent when the note was discounted. The question is therefore presented, whether the procuring of the discount of such a note by an officer of the association is a willful misapplication of its moneys within the meaning of the law. We are clearly of opinion that it is not. It is not even necessarily a fraud on the association.

“One branch of the business of a banking association is the discounting and negotiating of promissory notes, and this is to be done by its board of directors or duly authorized officers or agents. Section 5136, Revised Statutes. There is no provision of the statute which forbids the discounting of a note not well secured, or both the maker and indorser of which are insolvent. It is within the discretion of the directors or the officers or agents lawfully appointed by them to discount such a note if they see fit, and it might, under some circumstances, tend to the advantage of the association. This count does not charge that the note of the defendant was discounted at his instance, without the authority of the board of directors. On the contrary, the charge is that he caused and procured it to be discounted. This implies that it was done by the directors or other duly authorized officers or

agents. It is not alleged that the discount was procured by any fraudulent means. From all that appears the board of directors or the officer or agent by whom the note was discounted may, upon knowledge of all the facts in the utmost good faith and for the advantage of the association, have desired to discount the note. The discount may have turned out to be a benefit to the association, and there is no averment that the note was not paid at maturity or that the association suffered any loss by reason of its discount.

“But whether the discounting of the note was an advantage to the association or not, and whether the note was paid or not, is immaterial. *If an officer of a banking association, being insolvent, submits his own note with an insolvent endorser as security to the board of directors for discount, and they, knowing the facts, order it to be discounted, it would approach the verge of absurdity to say that the use by the officer of the proceeds of the discount for his own purposes, would be a willful misapplication of the funds of the bank, and subject him to a criminal prosecution.* The count under consideration charges nothing more than this against the defendant. We are of opinion therefore that it does not charge an offense under Section 5209, of the Revised Statutes.”

In *United States vs. Britton*, 108 U. S. 193, 197, the Court said:

“In respect to the third count the count charges neither application or misappli-

cation by the defendant of the funds of the association. It merely charges that he failed to apply certain funds standing to the credit of Alfred M. Britton to the payment of Britton's debt. It charges that he permitted Alfred M. Britton to do a perfectly lawful act, namely, to withdraw his own funds from the association and transfer them to another bank.

"This might be an act of maladministration on the part of the defendant. It might show neglect of official duty, indifference to the interests of the association, or breach of trust, and subject the defendant to the severest censure and to removal from office; but to call it a criminal misapplication by him of the moneys and funds of the association, would be to stretch the words of this highly penal statute beyond all reasonable limits. . . .

"In our judgment, the count under consideration, as well as the first and second, is bad."

In *United States vs. Britton*, 108 U. S. 199, 206, the Court said:

"The indictment having charged a conspiracy between the defendants to misapply the moneys of the association, proceeds to aver by what means the misapplication was to be effected, namely, by procuring to be declared by the association a dividend when there were no net profits to pay it. If procuring the declaring of such a dividend by the association is not a willful misapplication of its funds by these defendants, then the indictment charges no offense.

The declaring of a dividend by the association when there were no net profits to pay it is, in our judgment, not a criminal misapplication of its funds. It is an act done by an officer of the association in his official and not in his individual capacity. It is, therefore, an act of maladministration and nothing more, which, while it may subject the association to a forfeiture of its charter, and the directors to a personal liability for damages suffered in consequence thereof by the association or its shareholders, does not render them liable to a criminal prosecution. The act belongs to the same class as the pledge by a banking association of its own shares when not necessary to prevent a loss on a debt due it, which, in *United States vs. Britton*, 107 U. S. 655, we held not to be a criminal misapplication of the funds of the association. If, therefore, the indictment had charged that the defendants had misapplied the funds of the association by themselves declaring a dividend, when there were no net profits to pay it, it would not have charged a criminal act, much less when it merely charges that they conspired to procure the association to declare a dividend under like circumstances. So that it appears on the face of the indictment that the conspiracy charged was not a conspiracy to commit an offense against the United States.

“Our opinion is that under this indictment the defendants are not ‘liable to the penalties provided by Section 5209, upon proof that they, as such directors, willfully voted for the declaration of a dividend, knowing there were no net

profits out of which to pay the same,' because this is not the offense with which they are charged in the indictment. And as they are charged with a conspiracy to do an act which is not an offense, we are of opinion that no penalties could be inflicted on them under the indictment."

In *Adler vs. United States*, 182 Fed. 464, 469, the Court said:

"The evidence indisputably shows that by the transaction charged the Schwartz Foundry Company obtained no money, and that the bank lost none, and that there was no misapplication of the funds of the bank. It is difficult to believe that the statute intended to condemn as criminal, transactions by which the bank lost nothing, and could not, in the nature of things, have been subjected to any loss, and by which defendant gained nothing for himself or for others."

In *United States vs. Britton*, 107 U. S. 655, 666:

"We think the willful misapplication made an offense by this statute (Section 5209, R. S.) means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. Therefore to constitute the offense of willful misapplication there must be a conversion to his own use or the use of some one else of the moneys and funds of the association by the party charged. This essential element of the offense is not averred in the counts under consideration, but is negatived by the averment that the shares purchased by the defendant were held by him

in trust for the use of the association, and there is no averment of a conversion by the defendant to his own use or the use of any other person of the funds used in the purchase of the shares. The counts, therefore, charge *maladministration* of the affairs of the bank rather than criminal misapplication of its funds. If we hold these notes to be good, then every official act of any officer, clerk or agent of a banking association, by which its funds are applied in a way not authorized by law would be punishable under Section 5209. . . .

“To bring the case under Section 5209 there must be averments to show that the application was not merely a use of the money for the benefit of the association forbidden by law, but a criminal misapplication by which it was possible that the association could be defrauded.”

VIII.

(3) *Or if any offense is shown by the evidence, it is “making a false entry,” and not “unlawful abstraction.”*

Changing a credit in a depositor's account on the books of the bank from one payable on demand to one payable at the end of a specified period, or filing a deposit slip which causes a depositor's account on those books to be given a credit to which he is not entitled, nothing being shown to have been abstracted from the bank because of such credit having been given, is, if any offense under Section 5209, R. S., the “making of a false entry.”

IX.

(4) *If any offense is shown by the evidence, it is "obtaining money under false pretenses," and not "unlawful abstraction."*

The evidence shows that the memorandum checks were presented to the bookkeeper of the bank. Therefore if any money was given to the defendant or anyone by the bookkeeper or the teller because of his having given the bookkeeper the memorandum check, the title to the money was voluntarily transferred to the defendant by another officer of the bank, and the defendant did not "abstract" or take it.

If money or goods are obtained by a fraudulent trick or pretense, but the owner, being deceived by the pretense, intends to part with his property in the money or goods, the offense is that of obtaining money by false pretenses, and not larceny or "unlawful taking." *R. vs. Adams*, 1 Den. 38 (*The leading English case*); *R. vs. Atkinson*, 2 East P. C. 673; which hold that this rule applies where goods are obtained by the forged or pretended order of a customer.

X.

The Court erred in admitting in evidence, over defendant's objection, testimony that the account of the person to whom the defendant had lent the money charged to have been abstracted was in overdraft at the time of such loan.

The defendant was not being tried for maladministration or for abusing the power which had been given to him by the board of directors to lend the money. He was charged with having abstracted moneys of certain depositors from the bank by means of a memorandum check. Therefore the admission of testimony that the account of the person to whom the defendant lent the money was in overdraft at the time of such loan was the admission of evidence tending to show a distinct offense in no way connected with or related to the charge on which defendant was being tried, and was highly prejudicial and injurious to defendant because such testimony *was considered by the jury under the Court's ruling as evidence tending to show that the defendant was guilty of the offense actually charged against him.*

XI.

The evidence shows that if any abstraction was made it was made "with the knowledge and consent of said national banking association," that is, with the knowledge and consent of its managing agent who had full charge of its business.

As managing agent the defendant had possession and the right of disposal of the property of the bank. If an abstraction was made by him, he, as such managing agent, knew that the abstraction was made, and it is elementary that the knowledge and consent of a managing agent is the knowledge and consent of the principal.

XII.

The Court erred in refusing to give defendant's requested instruction No. 12.

(Assignment of Error No. XXXV, Tr., p 270; also Tr., p. 228.)

That requested instruction was that the jury be instructed that if the defendant had authority from the depositor to withdraw the amount of the depositor's account from the bank and apply it to a certain purpose, and did withdraw the amount, but applied it to a different purpose, he would not be guilty of "unlawful abstraction of moneys of the bank." It was obviously correct and should have been given.

XII A.

The defendant erred in admitting in evidence to show intent to defraud the so-called "similar offenses" or transactions.

(1) The admission by the court of this evidence prejudiced and injured the defendant because the instructions given by the Court, based on it, led the jury to believe that these "similar offenses" were unlawful (whereas, as a matter of fact, they were unquestionably lawful), and therefore that the defendant had been engaged in a course of criminal conduct.

(2) Furthermore, under the theory adopted by the Government in the lower court that the de-

fendant had used funds specially held by the bank for a given depositor, without authority, nevertheless the admission of the proof relating to other alleged offenses was highly prejudicial and was erroneous.

Taking the objections in the order named:

(1) Throughout this argument it is the contention of the plaintiff error that the defendant being the authorized president of the corporation, had the right to loan the bank's funds. The Government entirely failed to prove any special deposit giving ownership to the depositor in any of the funds entrusted by him to the bank. Therefore the funds were the property of the bank and not of the depositors, and the president had an absolute right to loan them under the authority he held from the bank. The bank as a debtor owed money to the creditor but the president could abstract no funds belonging to a depositor because the funds were the property of the bank.

Had the Government intended to proceed on any other theory it should have indicted for abstracting the funds of the bank and not the funds of a depositor. Having elected to stand upon a certain theory it is bound by the allegations of its indictment. Its proof must conform to its allegations. Its proof is of a state of facts obviously at variance with the allegations of the indictment. Under the authorities heretofore cited in this brief, everything done by the plaintiff in error was lawful. By admitting in evi-

dence proofs of any similar acts committed by the defendant in the court below the jury were unquestionably given the distinct impression that the defendant had been guilty of an extended course of unlawful dealing. By permitting the Government to introduce evidence relating to a long series of acts, under the instructions of the court, the jury could not have received any other impression than one distinctly unfavorable to the defendant.

(2) We are utterly unable to believe that this court can hold that any offense was committed by the defendant under the allegations of the indictment and none under the proofs adduced. However, as the Government proceeded on the theory that the defendant had abstracted funds without the authority of the depositors, to whom the Government contended the funds belonged, the United States Attorney introduced evidence of numerous actions on the part of defendant in loaning funds under similar warrants of authority from depositors.

The authority upon which such evidence was introduced, as explained by the instructions of the Court, was to establish intent on the part of the defendant.

Evidence of "similar offenses" is always extremely injurious to a defendant because by cumulative effect it leaves before the jury a mass of proof any single element of which may establish nothing from a criminal standpoint, but the whole mass of

which leaves, in the confused mind of the juror, an indistinct but overwhelming impression of guilt of some kind or other. The fact that the Court admits evidence of these so-called "offenses" of itself convinces the jury that the act of the defendant was a crime—otherwise the Court would not admit proof of it.

In the present case—laying aside for the moment the contention that the act of the defendant was guiltless under the statute—and assuming that the act of the defendant charged in the indictment was a crime, proof of these "similar offenses" was highly prejudicial. There was no attempt by the defendant to dispute the fact that certain funds had been loaned and the defense was that the depositor had consented. This was admitted by the depositors in every case, although there was some qualification as to the extent of the authority.

Under the theory adopted by the Government on the trial, the only difference could be as to the authority given by the depositor to the defendant. The president claimed he had authority and the depositor either admitted such authority or disputed the extent of it. Assuming that the Government's contention was right and that the defendant committed the act, the intent flowed from the act, if done without authority. The admission of testimony of other appropriations of money could only have the effect of tending to sustain the contention of the prosecution that the money was taken without authority, that

being the only issue disputed in the court below. Each case, however, depended upon its own peculiar facts, and the result of the admissions of proof of other "offenses" was to array against the defendant a number of claimants, many of whom were wrong in their contentions, and found by the jury to be wrong. The admission of such proof under the circumstances was clearly error and was most highly prejudicial.

The law relating to proof of "similar offenses" has engaged the attention of a great number of judges and courts. Nowhere has the subject received better attention than in the case of *State v. Bokien*, 44 Pac. 889, where the defendant was charged with having obtained money by means of a worthless check. There the Supreme Court of Washington says:

"Upon the trial the court permitted the state to introduce in evidence, over the objection of the defendant, several checks drawn by defendant prior to the date of the one in question, and to prove that they had been presented to the bank by the various persons to whom they were given, and were not paid because the defendant had no funds on deposit, and that defendant knew that payment thereof had been refused. It seems that this evidence in reference to the drawing and delivery of other checks was admitted for the purpose of showing the condition of defendant's bank account, and, as a consequence, the intent with which he delivered the check to Sharick. There was no con-

nection whatever between the several transactions which were permitted to be shown and that for which the defendant was being tried, and the evidence objected to was, therefore, incompetent for any purpose. We are, of course, aware that there are exceptions to the general rule that it is not competent to show the commission of another distinct crime by the defendant for the purpose of proving that he is guilty of the crime charged, but we are of the opinion that the evidence here admitted does not come within any of the exceptions. *Commonwealth v. Jackson* 132 Mass. 16; *Barton v. State*, 18 Ohio, 221; 3 *Rice Ev. pp.* 208-11. The evidence was not competent to prove the intent of the defendant in the particular transaction mentioned in the information, for the reason that it would not logically or legitimately follow that he intended to defraud Sharick because he had defrauded other parties at various times previously. It was not competent for the purpose of showing defendant's motive, for that, as well as his intent, would be inferred from his acts. The question of mistake was not involved in the case, and the previous transactions of the defendant which were permitted to be shown no more formed a part of a single scheme than the several larcenies of a thief (*State v. Kelley*, 65 Vt. 531, 27 Atl. 203); and it certainly would not be competent, in order to show that one had stolen certain property, to prove that he committed larceny at a previous time. The evidence as to these checks which were not mentioned in the information must have been greatly prejudicial to the defendant, for it, in effect com-

pelled him, without previous notice, to acquit himself of at least seven distinct offenses in addition to the one with which he was directly charged. Moreover, in this instance, the question of criminal intent or guilty knowledge was not in issue, for at the very threshold of the trial the defendant admitted that he signed the check in controversy; that he delivered it to Sharick, and got from him the pitcher; and that he then had no money in the bank to meet it; and at the same time he gave notice to the prosecution, through his counsel, that he expected to prove that he never made the pretenses and representations alleged in the information, but, on the contrary, expressly stated to the prosecuting witness, Sharick, when he delivered the check, that he then had no money in the bank, but would have soon, and that the check would then be paid; and he so testified in his own behalf, and his testimony was corroborated by other witnesses. There was, therefore, really but one question for the jury to determine, and that was whether the defendant did or did not make the statements imputed to him; and hence all of the evidence in regard to the giving of other checks was absolutely foreign to the case, and therefore, inadmissible upon any theory or rule of evidence."

In the case of *State v. Burlingame*, 146 Mo. 207 (48 SW 72), the defendant, who was president of a bank, was indicted for having received a deposit, knowing the bank to be insolvent. Witnesses were permitted to testify to making similar deposits under

like circumstances. The court reversing the action of the trial tribunal says:

“It is clear, we think, that each deposit, if received under circumstances prohibited by statute was a separate and distinct offense, and this being so, the evidence was inadmissible. It was not permissible for the purpose of showing guilty knowledge on the part of the defendant because different crimes, provided the bank was insolvent or in failing circumstances at the time and defendant knew it, and the evidence did not tend to show these facts, besides, the evidence was positive that the defendant received the deposit described in the indictment in person, and with respect thereto no additional proof of guilty knowledge was necessary.”

For language equally strong see the decision in *Commonwealth v. Jackson*, 132 Mass. 17 (44 Am. Rep. 299).

We are aware of the fact that there are federal cases in which it has been held permissible to introduce evidence of “other offenses” to establish intent. Reference may be made to the case of *Brown v. United States*, 142 Fed. 1, and *Dorsey v. United States* 101 Fed. 746, where an officer of a bank was charged with unlawfully abstracting money from his bank, by making loans to irresponsible institutions in which he had an interest. In such cases the intent of the defendant in making the loan and taking the money of his bank becomes important. As an officer he had a right to make the loan, but if, by a consistent

course of misconduct, he appropriated the money of his banking institution and loaned it to irresponsible companies in which he had a private interest, and *for the purpose of private gain, it became material to show that he was not making these loans legitimately as an officer but with the criminal intent to enrich himself by fraudulent withdrawals of funds.* The distinction between the classes of cases is marked and apparent.

We believe that the language of Judge Sanborn, dissenting, in *Dorsey v. United States, Supra*, is distinctly applicable to the case at bar and of itself distinguishes the cases which have been relied on by the Government from that now before the Court. Judge Sanborn says:

“In my opinion, there were three grave errors in the trial of this case, which entitle the plaintiff in error to another hearing:

(1) “The government was permitted to introduce in evidence, over the objection of defendant, as a part of its case in chief, a report of the comptroller of the currency dated on May 17, 1892, which was not counted on in any of the indictments, ‘for the purpose’ as counsel for the government stated, ‘of showing that certain items were falsely made in that report, of a similar kind to those charged in other reports, and for the purpose of showing the intent of defendant in making false entries in reports, aside from those on which he is specifically charged.’

That is to say, this report was offered in evidence for the purpose of showing an independent offense with which the plaintiff in error was not charged, and for the purpose of showing his intent to commit that offense, in the hope, doubtless, that the jury would infer from this that he intended to commit and did commit some of the offenses with which he was charged. This report seems to me to be irrelevant, because it is not mentioned in the indictments; because no charge of false entries in it had ever been made in any way before it was offered in evidence upon the government's case in chief; because no proof that any of the entries in it were in fact false had been produced when it was received in evidence; because it was not competent to try or convict the plaintiff in error of the offense of making false entries in this report, without indictment or notice, and it was not competent to convict him of any other offense by proof of this crime with which he had never been charged, of which he had received no notice, and against which he had no opportunity to prepare his defense."

XIII.

The Court abused its judicial discretion in refusing to direct the jury to return a verdict in favor of the defendant, and in denying defendant's motion for a new trial, since the verdict was contrary to the evidence, and the evidence was insufficient to justify the verdict.

The fact that the Court stated after the return

of the verdict, that it did not believe that the evidence showed an intent to defraud, taken in connection with the total absence of facts from which an intent to defraud could be inferred, shows that the Court abused its discretion in denying defendant's motion for a new trial.

It is well settled that it is the duty of the Court to withdraw a case from the jury when there is insufficient evidence in the case from which the jury can properly find in favor of the party upon whom rests the burden of proof.

Pleasants vs. Faust, 22 Wall. (U. S.) 116;

Schuylkill, etc. Co. vs. Munson, 14 Wall. (U. S.) 442;

Bell vs. Carter, 164 Fed. 417;

U. S. vs. R. R. Co., 189 Fed. 471;

Mining Co. vs. Mining Co., 203 Fed. (C. C. A.) 795.

XIV.

If a violation of Section 5209, R. S., be a misdemeanor, the judgment and sentence that the defendant be imprisoned for five years are void.

It is a corollary of Section 335 of the Federal Penal Code of 1910 that: "*No misdemeanor shall be punished by imprisonment for a term exceeding one year.*"

Section 335 of the Penal Code (Act of Congress of March 4, 1909, ch. 321, 35 Stats. at L. 1080, 1152) provides that:

“All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.”

This objection is fully presented under Point 2 of this brief on consideration of demurrer to indictment.

XV.

Assuming the Government's theory under the indictment to be correct, and the indictment to state an offense against the United States, the evidence fails to sustain the verdict but is directly opposed to the verdict.

So great is our confidence in the contention that the indictment does not state an offense against the United States and that the Government's case proceeded on an absolutely erroneous theory that there had been an abstraction of funds owned by the depositor, it is with reluctance that we review the evidence at all. Nevertheless, assuming even the Government's theory to be correct the evidence is insufficient to warrant a conviction and this court should reverse the judgment of the court below.

The defendant in the court below, after the overruling of the demurrer to the indictment, could do nothing but meet the Government on its own contention. The Government contended that the defendant had used the funds of the various depositors named in the indictment which were then on deposit with the bank, of which Sheridan was president. The defend-

ant introduced evidence to show that he had authority from the depositors to make these loans.

Eight separate counts were lodged against the defendant; on six he was acquitted; on two convicted. The first upon which conviction was obtained related to the deposit of David Hull (count one). Mr. Hull testified on his direct examination as follows: (Tr. 44).

“I had a conversation with Mr. Sheridan, relative to the loaning of some of my money, in March, 1906. I told Mr. Sheridan, one day I met him, I had some money. I said ‘Mr. Sheridan, how about loaning out some money to a good man?’ ‘Am I a good man?’ I said, ‘Yes sir, you are, Mr. Sheridan.’ I never gave him any other authorization except that.”

On cross examination the witness Hull testified as follows:

“I had been in the bank and I said, ‘How about loaning about \$500 of my money to a good man,’ and Mr. Sheridan said, ‘Ain’t I a good man?’ And I said, ‘Yes Sir.’ I have no idea when that was. I don’t know how much I did have in the bank at that time. I knew then that he took \$500. I didn’t know exactly at what time, for he didn’t say, but I expected him to. I don’t know what year this was in. I suppose he took \$500. *I told him to take it.* I never got no note. I suppose the note is in the bank.” (Tr. 44.)

The witness then produced his bank book showing a debit of \$512.50 and promissory note for \$512.-

50. He admitted receiving \$460.00 on an \$800.00 note to John Sheridan, signed by Tom Sheridan, \$400.00 being principal and \$160.00 interest. (Tr. 44-5.)

The witness likewise admitted having signed a statement to the National Bank Examiner that he had authorized Mr. Sheridan to draw these funds and invest them for him. (Tr. 47.) The witness says that he thoroughly understood what was meant by signing this instrument to the National Bank Examiner and that it was read all over to him and he reaffirmed its correctness at the trial. (Tr. 48.) This letter to the National Bank Examiner, with the release clause, is Defendant's Exhibit No. 1.

Relating to the David Hull account the defendant's testimony does not differ materially from that of the witness and is found Tr. p. 212. He states the authority given him by the witness Hull.

The other count (count four), upon which the defendant was convicted, related to the matter of Laura M. Verrell.

This witness testified to being a depositor in the bank and that her conversation with the defendant was as follows:

“He asked me if I wanted to loan that money that was paid in on the mortgage; he said he would get a good loan for me and I supposed it was to be the bank would loan the money. There was nothing said about it, that the bank was to loan that money, but he asked, not in-

dividually, but as President of the bank, a representative of the bank; I supposed that the bank was the one that was loaning."

Court. "Just state what was said."

Witness continuing. "Mr. Sheridan wanted to know if I wanted to loan it, and I said I didn't know, I was intending to put it into real estate, and he said I would better loan it, it would bring me more, and I didn't want to give him any answer at that time, I wanted to think it over, which I did, and he wanted to know at that time if I wanted to put any more with that \$4,000 and I told him I didn't know, that I would think it over, which I did, and I told him that I would put some more that time but there was nothing said of how much to put with it, how much I would put with it, because at that time I expected to see him again before this loan was made. That is all the conversation we had until he handed me the memorandum check; there was nothing said as to when the money was to be drawn from the bank or how. When he handed me the memorandum check, I never saw a memorandum check before and I supposed that was to show the bank had loaned my money. He said my money was safe—safely invested, and I told him at that time I didn't know as I ought to spare that much, and he said I could have it at any time by giving a short notice, so I let it go at that, and I supposed my money was loaned by the bank." (Tr. 74-5-6.)

The witness testified that the memorandum check was handed to her by Mr. Sheridan in the Bank.

(Tr. 78.) *The witness then admits having signed a letter to the National Bank Examiner, Mr. Goodheart, in which she acknowledged that she had given authority to Mr. Sheridan, the defendant, to use the money. The witness endeavored to state that the letter was misrepresented but acknowledged that no explanation was made concerning it to her. This letter was received through the mails, read over by the witness and mailed by her. (Tr. 81) and is found on Tr. p. 82.*

This witness was intelligent, tried repeatedly to draw distinctions between Mr. Sheridan in his private capacity and in his capacity as representative of the bank. (Tr. 74.) The witness acknowledged receipt of letters from Mr. Sheridan relating to her interest on the money loaned, etc. (Tr. 85.)

Under this state of the record the court below was asked to give to the jury the following instruction:

“If you find that the defendant had exclusive power to make loans for the bank, then the defendant was not required to obtain the consent of a depositor having a checking account to the withdrawal, for the purpose of making loans on behalf of the bank, of the moneys deposited by the depositor.” (Tr. 270.)

The case below was tried by the District Attorney on the theory that he had to bear the burden of proving the money to be taken without authority. On page 77 of the transcript the U. S. Attorney said:

“Now, as I understand, it is going to be incumbent upon me to establish that this money was taken in the manner and approximately the time named in the indictment, *and that it was taken without authority of these people.*”

While we think that we have made our contentions clear that this theory is wholly at variance with the law, and that the loaning of the money was lawful by the president in handling the funds of his own bank, yet, meeting the contention of the Government the evidence we have above referred to (which is practically all the evidence of consequence relating to these two counts), the defendant was entitled to an acquittal and is now entitled to a reversal.

The defendant appears from the testimony to have been a kindly, respectable and well meaning man, trusted by his neighbors and friends. He was approached by these depositors whom he had known for many, many years, who wanted their money loaned. Believing that it was their money they authorized the loan; the authority was undisputed. The money was loaned and checks and promissory notes received and interest paid and received and acknowledged by the depositors. Thereafter in the settlement of the affairs of the bank, which were to be taken over by another institution, the National Bank Examiner addressed a letter to each of these depositors detailing the fact that Mr. Sheridan had informed him that these moneys were loaned by their direct authority and asking them, if true, to confirm

this. *They did confirm it in writing, and the writing appears in the record and in the exhibit.*

It is one of the failings of human nature that when money is lost the loser wishes to blame somebody. Even people of normal mental balance seem then disposed to repudiate everything they have said and done. One of these witnesses attempts to quibble over the signing of this authority, but her explanation is a mere excuse. The record stands practically without dispute that Mr. Sheridan, if he were loaning a depositor's money, had ample authority from the depositors; that such authority was repeatedly ratified and acknowledged; no complaint was made until long after when it appeared that in the general affairs of the bank there was a money loss.

Under the evidence the defendant was entitled to an acquittal, and while we are profoundly convinced that he committed no offense under the U. S. Statutes, yet adopting the theory of the Government's case, he committed not even a moral offense and the judgment on the verdict should be reversed.

Defendant respectfully submits that because of the errors committed in the court below, and hereinbefore particularly set forth, he has suffered grievous injustice and the judgment and sentence imposed upon him by the Court below should be reversed.

JOHN L. McNAB,

Attorney for Plaintiff in Error.

No. 2705.

IN THE UNITED STATES

Circuit Court of Appeals

For the Ninth Circuit

THOMAS R. SHERIDAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF
OREGON.

BRIEF OF THE UNITED STATES.

CLARENCE L. REAMES,
United States Attorney.

ROBERT R. RANKIN,
Assistant United States Attorney.

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BRIEF OF THE UNITED STATES.

STATEMENT OF FACTS.

In the main, the statement of fact as given in the brief of the plaintiff in error, hereafter called the defendant, is correct, and insofar as they accord with

the views of the government the same are adopted as the government's statement of facts, but there is necessity that the Court be apprised of several material changes and additions:

Mr. Thomas R. Sheridan, in addition to being a director of the First National Bank of Roseburg, was its president from 1891 up to the time of its consolidation with the Douglas National Bank, about June, 1911.

Of the eight counts contained in the indictment, there was conviction upon two, to-wit, the first and fourth.

The abstraction from the account of David Hull was charged in the first count in the indictment. The impression is left from the testimony of David Hull, as quoted on pages 5 to 9 of plaintiff's brief, that David Hull was a man of ordinary intelligence and capable of transacting his business, but the residue of the testimony of David Hull discloses that he could neither read nor write (Tr. p. 42); he worked twelve or fourteen years in a livery stable at Roseburg, Oregon; that he knew Mr. Sheridan for many years, had confidence in his honesty and integrity, and was a depositor in the First National Bank of Roseburg for about twelve or fourteen years (Tr. pp. 39, 49.)

Much of the evidence introduced by the government goes to show that the sums taken out of the accounts of the individual depositors by system of

memorandum checks adopted in the bank, were simply transferred as credits to accounts of either the defendant or his associates. The defendant Sheridan claims that there is no evidence that any checks were ever drawn against the credits so entered in favor of the accounts of the defendant or of his associates. For example it is claimed by defendant (def'ts brief p. 8) that there was no evidence whatever that any checks were ever drawn against the credit entered in Agee's account, either by Agee or the defendant or anyone else.

In this particular the evidence does show that the defendant handled the money of Agee and himself (Tr. p. 185) and financed B. C. Agee, and took care of their joint farming business (Tr. p. 185), and this money abstracted by the defendant from the account of David Hull went into the B. C. Agee account. (Tr. pp. 66, 67).

The government offers to the Court two theories either one or both showing conclusively that the First National Bank of Roseburg had money abstracted from it by the defendant within the meaning of section 5209 Revised Statutes of the United States.

1. The defendant drew a memorandum check (Government's Exhibit No. 4,) dated March 4, 1911, to the order of B. C. Agee, which he signed with the name of B. C. Agee by himself. This memorandum check was against the general checking account of

David Hull. There is no showing when the book was balanced and returned to Hull, but the first information contained which Hull could have received with regard to this abstraction was his receipt of a letter from the bank examiner, Mr. Goodhart, subsequent to June 20, 1911, (Tr. p. 47). His receipt and signing of this letter from the bank examiner was carefully explained (Tr. p. 56 to 58). The defendant admits (Tr. p. 213) that he drew this memorandum check in order to take the money out of the account and put it out at interest, and that the sum so designated on the memorandum check was withdrawn from the depositor's account (Tr. pp. 213, 214). The defendant also executed a promissory note (Government's Exhibit No. 6) dated March 4, 1911, for \$230.00, payable on demand to David Hull which was signed by the defendant with the name of B. C. Agee, by T. R. S. (Tr. p. 64). The defendant further admitted (Tr. p. 213) that the sum of \$230.00 went to the credit of B. C. Agee's account, and on March 4, 1911, the account of B. C. Agee was shown by the books to be credited with \$230.00 (Tr. pp. 66, 67). While Mr. Agee never signed this note to David Hull, and never had any talk with the defendant in which he authorized the defendant to sign the note for him, and knew of this note for the first time upon the assignment for the benefit of creditors by the defendant (Tr. p. 103); the defendant was a partner with Agee in the orchard and farm (Tr. p. 102), and the defendant

looked after the financial part of that partnership (Tr. p. 103); therefore, the money being put in the partnership account of the defendant, was, for all practical and legal purposes, entirely in his control, and over which he exercised absolute disposition.

It is proper at this point to show that the account of Mrs. Laura M. Verrell does not differ from that of David Hull in that the money abstracted by the defendant went to his use and benefit. This is shown by the following evidence:

The defendant drew a memorandum check No. 9, against the account of Mrs. Laura M. Verrell, which check was dated April 15, 1911, and was for the sum of \$5,000, and is admittedly signed by and in the handwriting of the defendant (Tr. p. 73). Page 386 of the individual depositors' book shows that on April 15, 1911, the account of Mrs. Verrell was debited \$5,000, with the statement that it was "loaned by T. R. S.," and the defendant thereupon admitted that this \$5,000 was transferred to his account on the books (Tr. p. 88).

Both the sums described in counts one and four of the indictment upon which the defendant was found guilty are therefore shown to have been taken from the accounts of the individual depositors and placed to the credit of the defendant in his account with the First National Bank of Roseburg. This debiting of the sum in the depositor's account and crediting the same in the defendant's account, was

admittedly without the authority of the directors of the First National Bank of Roseburg (Tr. pp. 188-190), and the jury found upon the evidence submitted that such conduct was without the authority of the depositors, by their verdict.

It is claimed by the government on its first theory of the abstraction, that this taking of money from the individual accounts of the depositors without the authority, as aforesaid, and placing the same in the individual account of the defendant, was an abstraction within the meaning of section 5209 of the Revised Statutes, because the bank was effectually deprived of the use of that money to meet any demand which might be made upon the individual account by the depositor and the injury which the statute seeks to prohibit was by that abstraction as effectually accomplished as though the money had been directly taken out without the intervening means of the defendant's account.

The indictment alleges that the moneys, funds and credits of the said National Banking Association were held by said association, "as a deposit for the sole use and benefit of one David Hull," or, "for one Laura M. Verrell," each being "a depositor and creditor of said The First National Bank of Roseburg." When the money was abstracted from said account to the use and benefit of someone other than the depositor, the bank was liable to that depositor for the money received from him, and because of

the unlawful abstraction of the defendant there was not the proper amount in the bank to the credit of the depositor from which to meet any demand obligation. The abstraction charged in the indictment is not a general abstraction from the bank, but an "abstraction and conversion to his, the said Thomas R. Sheridan's own use and benefit * * * from out of the moneys, funds and credits of the said National Banking Association, held by said National Banking Association as a deposit for the sole use and benefit of" the particular named depositor. Therefore, when the defendant caused the money of a depositor to be taken out of his account, leaving the account in overdraft, as was sometimes the case, and credited to his own account or the satisfaction of an overdraft in some of the accounts of his associates, as was other times the case, the money was not available by the bank for the use of the depositor because there was a larger demand upon the bank from another account. Whether these deposits so abstracted were in the defendant's pockets or in his account, which he could demand from the bank at any time, the abstraction so far as the bank's ability to lawfully comply with the demand of the depositor and the demand of the defendant was concerned, was complete.

2. However, it is not necessary that this theory of the government be resorted to in order to show

that the abstraction of the money of the depositors actually occurred. After the evidence shows, as above noted, that these sums of money went into the personal account of the defendant he repeatedly states in his own testimony that he "took" the money, "loaned it," "handled it," that he had "taken the money out," and "loaned it out again" (Tr. pp. 221 to 220, inc.), which phase of the case will hereinafter be more particularly dealt with.

The defendant states in his brief (p. 17) with much emphasis, that "all of the depositors, including David Hull and Mrs. Verrell, signed the releases and forwarded them to the examiner."

These so-called releases were letters written by Richard W. Goodheart, the bank examiner sent to the First National Bank of Roseburg, to the individual depositors upon whose accounts he found these memorandum checks drawn, with the statement that he, the bank examiner, was informed by the defendant that the individual depositors had warranted the loaning of this amount of money, stating the amounts, and date, and inquiring if such were the case, then below the signature of the bank examiner to that letter was a certificate certifying that authorization had been given to Mr. Sheridan to loan the amounts then specified and naming the parties to whom the loan was made, with a blank place for the signature of the depositor, if he cared to certify to the same.

This certificate was relied upon by the defendant, as it is advanced on the ground of authorization in this case.

While the defendant had had a conversation with most of the depositors concerning the loaning of their money, the jury found by their verdict in the counts alleging abstractions from the deposits of David Hull and Laura M. Verrell, that these conversations never amounted to authorizing the defendant to loan their money. The conclusion of the jury on this point was drawn from the following explanation of David Hull as to how he came to sign the so-called release.

“Q. When did you first learn that your money was loaned to Mr. B. C. Agee?

A. Well, I got a letter from the National Bank Examiner; got it out of the post office; took it to Mr. Hedgpeth; had him read it, and he said, ‘That is all right,’ so I had him sign my name. That was the first time I knew my money had been loaned to Mr. Agee. I cannot read or write.” (Tr. p. 42).

Again:

“Q. I hand you here a letter written to you under date of June 20, 1911, the original of a letter addressed to Mr. David Hull at Roseburg, Oregon, purporting to be signed by Richard W. Goodheart, National Bank Examiner, with release at the bottom signed by David

Hull, and ask you whether or not you wrote that. Did you write your signature here?

A. No, sir, I did not.

Q. I wish you would tell the jury in your own way how you came to sign that or authorize that to be signed.

Mr. Fulton: He says he didn't sign it.

Q. How did you come to authorize this to be signed?

COURT: He testified a while ago somebody else signed it at his request.

Q. Tell about that time with Mr. Hedgpeth.

A. I got that letter, that I am going to tell you, and took it down to the stage barn and Mr. Hedgpeth was there and I had him read it and he said 'That is all right, sign it,' and I said, 'if it is all right I will sign it,' and I did, and I took it and put it in my pocket and I didn't give it to Mr. Sheridan until next morning and I met him at the bank, on the sidewalk outside, and he read it and went on in the bank and that is all there was to it." (Tr. p. 43).

which testimony is corroborated by the statements of Mr. C. W. Hedgpeth, as follows:

"I am working for the Roseburg-Myrtle Point Stage Company. I signed the name of David Hull to the release (defendant's exhibit 1). The circumstances have been pretty well stated by Mr. Hull. The document was brought

—I supposed from the bank, at the time he brought it, he asked me to read it for him and I did so, and he asked me if I thought it was all right and the meaning of it, and I gave him my interpretation of the meaning of it, that it was a request from the bank to allow Mr. Agee to have \$230 of his money, then on deposit in the bank, and he said that was all right, to sign it, and I signed his name.” (Tr. pp. 59, 60).

With regard to the signing of the so-called release by Mrs. Laura M. Verrell, upon which the defendant places equal stress, the circumstances under which she signed the letter of the bank examiner are detailed by the evidence as follows:

“Q. Now, here is a letter dated June 20, 1911, written to you by a National Bank Examiner, Goodheart, purporting to be signed by you. I would like to have you look that over, Mrs. Verrell, and tell the jury whether or not you signed it, and if you did, the circumstances under which it was signed.

A. Yes, I signed that.

Q. Just go ahead now, in your own way, and tell the jury how you came to receive it and how you came to sign it.

A. Mr. Sheridan told me that I would receive that letter and when I received it to sign it and send it back to the bank examiner, which I did, but not before he saw the letter.

He saw the letter, I took it to him after I had signed it, I signed that letter in my home and I took it to him and he looked at it and read it over and looked at it and he said it was all right and he put it in the envelope and sealed it himself, but that letter was misrepresented to me.” (Tr. pp. 78, 79).

And again,

“Now, tell the jury in your own way the circumstances under which you took it (meaning the letter from the bank examiner) to the bank and to whom you delivered it.

A. I took it to the bank and showed it to Mr. Sheridan; he was at his desk, writing; I showed it to him and told him I had received the letter which he told me I would receive from the Examiner, and would like for him to look it over and see if it was all right before I sent it, which he did.” (Tr. p. 80).

which testimony is, to a large extent, admittedly corroborated by the defendant himself:

“Mrs. Verrell brought the release document in to me and she said, ‘Mr. Sheridan, I received this document; what shall I do with it?’ I said, ‘If it is correct, Mrs. Verrell, why sign it.’ I did not see it or take it in my hands at all. She laid it on the desk there, but I did not pick it up.” (Tr. p. 218).

Defendant boldly states that all depositors signed

the releases and forwarded them to the examiner. (Defendant's brief, p. 17).

The transcript of record with which counsel for Defendant is familiar clearly shows that J. E. Hainey, (Tr. pp. 107, 108), W. E. Chapman, (Tr. pp. 112, 116), H. P. Marks, (Tr. p. 141), E. E. Haines, (Tr. p. 155), Mrs. Elizabeth Byron, (Tr. pp. 186, 187) and J. F. Hoover, (Tr. pp. 192, 193), never did sign any of the releases in question.

In other instances depositors signed these so-called releases purely as a favor to their banker, not thinking that the bank examiner would care, but knowing the authorization was not true. (Tr. p. 146).

Other depositors saw Thomas R. Sheridan, the defendant, and he advised them to sign these so-called releases stating in most of those cases that the signing of these releases was a mere matter of form (Tr. pp. 149, 157, 159, 166, 176, 179).

It is well at this point to follow up the statement of the defendant that all depositors signed these so-called releases, and the further statement that the defendant was authorized by all these depositors to make the withdrawals of this money by the evidence, that in some instances at least, where the money was abstracted from the depositors' accounts there was no conversation with the defendant regarding any loan of the depositors' money.

Such cases are those of H. P. Marks, (Tr. p. 138), C. J. Marks, (Tr. p. 142), Edward C. Marks, (Tr. p. 146), and John E. Marks, (Tr. p. 156), and the memorandum checks which were drawn against these depositors' accounts were therefore unauthorized.

In other instances the conversation concerning the loaning of the money was had after the money had actually been taken from the account of a depositor. Such cases are those of W. J. Carlon (Tr. pp. 90, 91) and E. E. Haines, (Tr. p. 153).

In most instances the depositors did not know that the defendant was going to or had loaned the money to himself or his associates, and with one or two exceptions none of these depositors knew of the notes which were signed by the defendant in his own name, or in the name of his associates by himself until after it was brought to their knowledge by either the state or federal investigation. These notes were always placed in the bank vault and never delivered to any of the defendants, as testified to by J. E. Haney:

“The Government offered and there was received in evidence a promissory note of date May 24, 1911, in favor of J. E. Haney, in the sum of \$5,000, with interest at six per cent, payable on demand, the defendant admitting that the instrument is entirely in the handwriting of the defendant. It was marked Govern-

ment's Exhibit No. 16.

Witness continuing: I never seen this.

Q. You never saw the note?

A. No.

Q. Did you ever see this note before I handed it to you at this time?

A. No." (Tr. p. 108).

and by J. D. Cooley,

"I first saw these notes in the office of the United States Attorney, and prior to that time I had never seen them." (Tr. p. 167).

and by George P. McNamee:

"In regard to the promissory note, Government's Exhibit No. 70, the first time I ever saw it was when you showed it to me just now."

With respect to whether the depositors knew from their bank books after they were balanced, or the memorandum checks which were returned to them with their own checks, of the fact of the abstraction, David Hull, for example, could not read or write (Tr. p. 482), and what business he had as to reading or writing was done by others in apparently as poor a state of education as himself. Some of the depositors got their statements once a year (M. S. Doerstler, Tr. pp. 119, 126). Some received their memorandum checks when their books were balanced every two or three months, or a shorter time (Tr. pp. 137-150). The bank books of other depositors did not show that the money was taken from the account though they

did show that interest was received, presumably from the bank (Tr. pp. 145, 156); and in cases where it was shown that the memorandum checks by which the abstractions were made were brought to the notice of the witness, the witness did not know what the memorandum checks meant (Tr. pp. 75, 108, 110, 155), or thought that the bank had loaned the money as a bank (Tr. 155); and in another instance, the first time the witness ever saw the memorandum check was when the same was exhibited to him at the time of the trial (Tr. p. 170). Others did not see the memorandum check for nearly three years (Tr. pp. 138, 140), or, as testified to by Mr. Haines, (p. 154),

“The memorandum check was in the statement that was returned to me; I did not understand one thing in the world about it; I just supposed the bank had loaned money as they said they would, and I did not understand it at all. Did not know no more what it meant than nothing in the world; I never did know until now that I had Mr. Sheridan’s personal note for the amount;” (Tr. p. 154.)

And the defendant also argues from the execution of these notes and the payment of interest upon either the notes or the entrance of interest in the bank book that an awareness should have come to the depositors of the loan of their money.

It of course was impossible for any awareness to come to these witnesses, most of whom were not

even aware that the notes executed by the defendant and upon which interest was entered were in the vault of the First National Bank of Roseburg. In cases where the depositors found interest accredited to them in their bank books they thought that the amount had been borrowed by the bank and that interest came from the bank itself. An example of this is Mrs. Laura M. Verrell (Tr. p. 86). In other instances the record does not disclose whether interest was ever paid to the depositors or not and in still other instances no interest was paid nor even the principal debt.

Before proceeding with the discussion of the legal principles alleged to have been raised by the defendant's brief, counsel, after reading said defendant's brief, feels constrained to quote the remark of Mr. Justice Brown in the case of Cochran and Sayre vs. United States (1894), 157 U. S. 286:

"Few indictments under the national banking law are so skilfully drawn as to be beyond the hypercriticism of astute counsel—few which might not be made more definite by additional allegations. But the true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." (p. 290).

From the authorities cited hereafter it is believed that the alleged errors in this case will appear to the Court "hypercritical."

Hereinafter will follow particular points in support of the indictment, but now, as general authority for its correctness, it is stated that with the exception of the introductory portion which was taken from another approved form, the indictment is based and follows the second count of the indictment in the case of *United States vs. Northway*, which was held by the Supreme Court of the United States to be good.

United States vs. Northway, 120 U. S. 334 (1887).

A certified copy of that portion of the *Northway* indictment which was followed in this case is hereto appended as "Appendix A."

POINTS, AUTHORITIES AND ARGUMENT.

DIVISION I.

INDICTMENT.

(Note) An endeavor will be made throughout the rest of this brief to answer section by section, and paragraph by paragraph, where the same may appear necessary, the arguments advanced in the corresponding sections and paragraphs of the defendant's brief.

1. (Defendant's brief p. 22).

The first error assigned and argued with reference to the indictment in this case is that each count thereof charges that the defendant unlawfully abstracted and converted to his own use money held by the bank for "the sole use and benefit" of certain depositors, and that section 5209 intended to charge a crime only when the money was held by the bank as a bank and not as a bailee. Therefore, the money being that of the individual was a special deposit and it was no offense against the laws of the United States for the defendant to abstract it, but if an offense at all would come under the state law.

The question of the validity of the indictment upon this point is determined by the conclusion as to who, (the bank or the depositor) owns the money deposited with the bank by these depositors.

The fallacy of defendant's argument is based upon the erroneous conclusion of law that the money deposited by general depositor, as is the situation in these cases, is owned by the depositor. It is owned by the bank. This conclusion is shown by the following authorities:

(a) Unlike checks, cash deposited by customers with the bank ceases to be the property of the depositor and becomes the property of the bank creating at once the relation of debtor and creditor.

Balbach, et al, vs. Frelinghuysen, Receiver,

etc., 15 Fed. 675,

Marine Bank vs. Fulton, 2 Wall. 252, 256.

Also other authorities cited in the defendant's brief at pages 61, 62 and 63, where claims are made inconsistent with defendant's claims in this section.

(b) Deposits on general account belong to the bank and are part of its general funds; the bank becomes a debtor to the depositor to the amount thereof, and the debt can only be discharged by payment to the depositor or pursuant to his order.

Aetna National Bank vs. Fourth National Bank, 46 N. Y. 82.

(c) Deposits of money in a bank are either general or special; a general deposit is one which is to be repaid on demand in money and the title to the money deposited passes to the bank; a special deposit is one in which the depositor is entitled to the return of the identical thing deposited, and the title remains in the depositor.

Bank of Blackwell vs. Dean, (1900) 2 Banking cases, 232, 9 Okla. 626.

(d) Deposits of money made in a bank in the ordinary course of business are presumed to be general deposits.

Bank of Blackwell vs. Dean, (supra).

The indictment also alleges that the moneys, funds and credits abstracted were those of the said National Banking Association.

The indictment further alleges that these moneys, funds and credits were "held by said National Banking Association as a deposit" (not a **special** deposit) "for the sole use and benefit of" the depositor. What interpretation is to be attached to the term "held as a deposit for the sole use and benefit of the depositor" is determined by the above authorities and is to the effect that the bank owns these deposits and holds them as a debtor for payment on demand by the creditor.

That the relation of banker and depositor is that of debtor and creditor is well established.

North Madison Bank, Fed. C. 890, 5 Bliss 515;

Mathew vs. Creditors, 10 La. Ann. 344;

Nat'l Bank vs. Elliott Bank, (Mass.), 5 Am. Law. Reg. 711;

Knecht vs. U. S. Sav. Inst., 2 Mo. App. 563;

Aetna Nat'l Bank vs. Fourth Nat'l Bank, 46 N. Y. 82;

Baker vs. Kennedy, 53 Tex. 200.

The authorities upon this alleged point cited by counsel, when they touch the point at all, relate to special deposits with which this case is not concerned.

2. (Defendant's brief, p. 27).

Here error is alleged in that if the offense charged in the indictment is a misdemeanor, then as no punishment has been provided for it by Con-

gress the indictment does not state an offense against the United States.

Section 5209 Revised Statutes provides as follows:

“Sec. 5209. (Embezzlement; penalty.) Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.”

And apparently therein named the crime as a misdemeanor and provides the punishment therefor.

It is true that section 335 of the federal penal code of 1910 (35 Stat. L. 1152) classifies felonies and misdemeanors as to whether or not the punishment exceeds one year in which the crime is deemed a felony.

But this Act of Congress dated March 4, 1909, (35 Stat. L. 1088, 1152) in section 341 especially mentions all sections and acts which are repealed and does not mention R. S. Sec. 5209.

And where a statute expressly repeals specific acts there is a presumption that it is not intended to repeal others not specified.

Meese et al. vs. Northern Pac. R. R. (C. C. A. 9th, 1914), 211 Fed. 254, 262.

Since this was not a common law offense, Congress has the right to define the crime and state what the punishment shall be for the violation. The difference between misdemeanors and felonies is so well known as to require no particular mention; by classifying this crime as a misdemeanor there are certain penalties which were not imposed upon the defendant which otherwise would have been incurred for the violation of a felony.

3. (Defendant's brief, p. 31).

This section 3 and its subdivisions, claim that the indictment is defective because of particular reasons taken up in each one of the six subdivisions. The argument used in all of this division is predicated upon a major premise that the defense

charged in the indictment is a felony and afterwards mentions six minor premises from which six conclusions fatal to the indictment are drawn. All of these conclusions are erroneous because the major premise, that the indictment charges a felony, is erroneous.

The indictment charges a misdemeanor on the authorities cited in section 2 (*supra*) and herein.

It is, therefore, unnecessary to answer conclusions based on a false premise excepting so far as other points are involved.

a-i. Of course, the authorities for the indictment drawn in section 5209 R. S. have not been overruled by the Act of Congress enacting the penal code of 1910. Defendant's counsel himself, after this alleged conclusion, proceeds to quote largely from these authorities which he claims are overruled. His position is inconsistent. Presumption is always in favor of validity and against repeal.

While the question has never been directly raised so far as research has disclosed, cases are prosecuted and sentences instituted under this section without even the point raised by astute counsel, being considered.

ii. Since section 5209 R. S. itself declares this crime to be a misdemeanor, then the indictment must charge the crime with sufficient particularity to satisfy the statute and the general rule of indictments, to-wit, to sufficiently apprise the accused of

the crime which he is alleged to have committed.

In addition to the statement that this indictment follows one already adjudicated on the Supreme Court, the following authorities have been collected in the case of *United States vs. Britton* (1882) 107 U. S. 655, 661, where Mr. Justice Wood collected the authorities on the sufficiency of an indictment charging a misdemeanor under this statute as follows:

“The section of the Revised Statutes upon which the indictment is based creates and described certain offences, and expressly denominates them misdemeanors. In *United States vs. Mills*, 7 Pet. 138, 142, it was said by this court that ‘the general rule is that in indictments for misdemeanors created by statute, it is sufficient to charge the offence in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practice in cases of felony, and with respect to some crime, where particular words must be used, and no other words, however synonymous they may seem, can be substituted. But in all cases the offence must be set forth with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged.’

In the *United States vs. Simmons*, 96 U. S. 360, 362, this court, speaking by Mr. Justice

Harlan, held, that 'when the offence is plainly statutory, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming within the statutory description in the substantial words of the statute, without any further expansion of the matter.' But to this rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised in the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defence and plead the judgment as a bar to any subsequent prosecution for the same offence.'

So, in *United States vs. Carll*, 105 id. 611, 612, it was said by Mr. Justice Gray, speaking for the court, that 'in an indictment upon a statute it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.'

In *United States vs. Pond*, 2 Curt. C. C. 265, the rule was thus stated by Mr. Justice Curtis: 'It must be remembered that this is an indictment for a misdemeanor created by the statute, and that in general it is sufficient to describe such an offence in the words of the statute, unless they embrace cases which it was not the intention of the legislature to include within the law. If they do, the indictment should show that this is not one of the cases thus excluded.' "

3-b. (Defendant's brief, p. 33).

It is next claimed that the indictment charging a felony the description of the property is ambiguous and uncertain, because the indictment should show specifically how much money, how much funds and how much credit, have been abstracted by the defendant.

Again, we call the attention of the Court to the *Northway* indictment, appendix A.

The authorities also held such a requirement as unnecessary, and the following quotations will suffice to show the attitude of the courts to such objections as these:

Breese vs. United States (C. C. A. 4th, 1901),
106 Fed. 680, 688:

"Is it necessary to state how much of the embezzlement was of moneys, how much of funds, and how much of credits? Inasmuch as the accused was president of the bank, in

charge, or, at least, placed in supervision, of its assets, and as the charges against him are of transactions in small amounts, occurring on several days, such particularity is evidently impossible. Were this demand enforced, the government would be entrapped into making allegations which it would be impossible to prove. *Evans vs. U. S.* 153, U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830. The use of these words, notwithstanding their generality, was sustained in *U. S. vs. Voorhees* (C. C.) 9 Fed. 143. They were used in many cases before the supreme court, and no objection was taken. *Evans vs. U. S.* supra; *U. S. vs. Northway*, 120 U. S. 230, 7 Sup. Ct. 580, 30 L. Ed. 664; *Batchelor vs. U. S.*, 156 U. S. 429, 15 Sup. Ct. 446, 39 L. Ed. 478; *Coffin vs. U. S.*, 156 U. S. 433, 15 Sup. Ct. 394, 39 L. Ed. 481."

See also:

United States vs. Voorhees (C. C. N. J., 1881)
9 Fed. 143

and even if the description is not specific as to the amount of moneys, funds and credits, it is cured by the allegation that "a more particular description of which is to the grand jury unknown."

This allegation cures the indictment of any of the defects which are claimed to exist therein by reason of the authorities cited in support of his contention by the defendant, and which have been im-

pliedly overruled by the later attitude of the Supreme Court of the United States upon this point. The following authority announced the attitude of the courts with regard to this allegation:

Jewett vs. U. S., (C. C. A. 1st, 1900), 100 Fed. 832.

“The objection to count 84 is want of certainty, in that there is no distinct allegation of any unlawful act, because the grand jury reports that it was ignorant how Jewett misapplied the funds described. It is well settled, not only as a general rule of the common law, but in the supreme court, that the grand jury is entitled to set out in its indictment that certain facts, ordinarily necessary to be alleged, are to it unknown. This rule was applied to the description of persons whom there was an intent to defraud, under the section on which this indictment was framed, in *U. S. vs. Britton*, 107 U. S. 655, 665, 2 Sup. Ct. 512, 27 L. Ed. 520. The same result was reached in *Coffin vs. U. S.*, 156, U. S. 432, 451, 15 Sup. Ct. 394, 39 L. Ed. 481, with the additional statement that, where nothing appears to the contrary the verity of the averment of want of knowledge in the grand jury is presumed. In *Frisbie vs. U. S.*, 157 U. S. 160, 167, 15 Sup. Ct. 586, 39 L. Ed. 657, the rule was applied to the description of the excess amount received by an agent engaged in prosecuting a claim for a pension over

that permitted by statute. In *Durland vs. U. S.*, 161 U. S. 306, 314, 16 Sup. Ct. 508, 40 L. Ed. 709, it was applied with reference to the names of persons defrauded, or intended to be defrauded, contrary to section 5480 of the Revised Statutes. There is, therefore, ground for maintaining, if necessary to do so, that the well-known practice of the common law and the decisions of the supreme Court go far enough to cover the particular allegation objected to by the accused; but it is not necessary to determine this proposition."

And there was no evidence to the effect that the grand jury knew any more particular description of the moneys, funds or credits that had been withdrawn.

Furthermore, if the defendant were in any doubt as to what class of property he had abstracted, as charged in the indictment, his remedy was to require a bill of particulars to be complied with to the best of the government's ability.

United States vs. Voorhees, (C. C. N. J. 1881)
9 Fed. 143.

3-c. (Defendant's brief, p. 38).

The defendant claims that if the indictment charges a felony it is defective because the acts constituting the fraud or from which an intent to defraud may be inferred are not stated.

It is a well known rule of pleading that ultimate facts, not evidentiary matter, is all that is required to be set out in an indictment and is fully satisfied by the pleading (Sec. 3-f). The "means" of the abstraction is immaterial.

The allegations of fraud, as well as the allegations of intent to defraud, are clearly set out in the indictment. Any presumption of innocence attending the statement that the abstraction was "by means of a memorandum check," is overcome by the allegations in the indictment that the defendant "wilfully, and unlawfully abstracted and converted to his * * * own use, benefit and advantage * * * with the intent to defraud the said National Banking Association and said depositor and creditor therein." Such allegations are not consistent with innocence. The indictment upon this point can be sustained on either one of two theories:

1. The statement "by means of a memorandum check" states the means by which the abstraction was made, and the means being immaterial, as we shall point out, that statement is surplusage and can be ignored; or

2. In the case of *Evans vs. U. S.*, 153 U. S. 584, 593, 594, the court, in referring to certain counts alleging wilful misapplication of funds by means of the discount of promissory notes, said:

"Defendants' entire criticism upon these counts seems to be founded upon the hypothesis

that no weight whatever is to be given the words 'knowingly, wilfully, unlawfully and fraudulently,' or to the general allegation of an intent to defraud—in short, that these words are mere surplusage. Where, however, the statute uses words which are not absolutely inconsistent with an honest purpose, such as was held by this court in Britton's case were the words 'wilfully misapplied,' the allegation of an intent to defraud becomes material in the highest degree."

Again, in the case of the United States vs. Heinze, 218 U. S. 532, 543, the supreme court referred to the decision in the Evans case with approval, in part, as follows:

"It was said that weight must be given to the words 'knowingly, wilfully, unlawfully and feloniously,' " and,

"To the general allegations of an attempt to defraud."

It is therefore submitted that this indictment should be sustained in either view of the law.

As a further authority against the contention of defendant's counsel in this case, the language of this indictment follows the wording of the statute itself.

3-d. (Defendant's brief, p. 41).

Error is again alleged on the supposition that the indictment states a felony, and that it is

defective because it does not charge that there has been a violation of a right of either the bank or depositor.

An answer to this allegation, like most other answers to these claims, simply requires a reading of the indictment.

This indictment alleges, "the defendant wilfully and unlawfully abstracted and converted to his own use moneys, funds and credits of said National Banking Association" held by it for the use of the depositors, and that further, without the knowledge and consent of the association, these moneys were withdrawn. That language certainly charges a violation of the right of the bank.

3-e. (Defendant's brief, p. 42).

Predicated again upon the false premise that the indictment charges a felony, it is claimed that the indictment is defective because it charges in the language of the statute that the defendant unlawfully abstracted and converted certain property, which allegation is too indefinite and uncertain to inform the defendant of the specific criminal acts with which he was charged. In section 3-ii we cited several of the authorities to the effect that the charge in the language of the statute was sufficient for this character of crime.

The means of the abstraction, as we point out in the following section, is not material, and the emphasis laid on the abstraction "by means of the

memorandum check" by defendant's counsel, is likewise immaterial.

3-f. (Defendant's brief, p. 43).

Error is alleged in the charge of the indictment that the money was abstracted "by means of a certain instrument designated as a "memorandum check," which charge is unintelligible, uncertain and repugnant to other charges of the indictment, because there is not issued with the charge by means of an instrument designated as a "memorandum check," any suggestion of unlawfulness, or that the allegation concerning the memorandum check did not show the names of the parties who drew it, or in whose favor it was drawn, or that it was drawn on the National Banking Association mentioned in the indictment or was signed by the depositor or defendant, or whether with or without authority, or that it was not as valuable as the money withdrawn by means of it, or that it would not be paid if presented to the bank for payment, or that false credit was secured by the defendant with the bank by its means.

A study of section 5209 Revised Statutes, and the case of United States vs. Northway, 120 U. S. 334, discloses that the following allegations should appear in an indictment charging abstraction:

1. Averment of time and place;
2. That defendant was an officer, clerk, or agent of a national banking association;

3. That the bank (naming it from its organization certificate) was a national banking association, theretofore duly organized and established, and then and there existing and doing business at a place named, under the laws of the United States;

4. That the defendant being then and there such officer, abstracted the moneys, funds and credits of the association, describing them as best possible;

5. Without the knowledge or consent of the association;

6. With the intent to injure and defraud said association, or some other company or person.

It therefore appears that the means of abstraction is a non-essential element in charging the crime defined by section 5209.

Being non-essential an allegation of means must be surplusage.

And if surplusage, it cannot injure the defendant because no presumption of innocence attaches thereto by reason of the other allegations of the indictment.

And if surplusage and without prejudice to the defendant, the Court's attention is called to section 1025 Revised Statutes of the United States:

“No indictment found and presented by a grand jury in any district or circuit, or other court, of the United States, shall be deemed insufficient, nor shall the trial, judgment or other

proceeding thereon be affected by reason of any defect or imperfection in matter or form only, which shall not tend to prejudice the defendant.”

2. The means of abstraction is immaterial:

U. S. vs. Harper (C. C., S. D. Ohio, 1887) 33 Fed. 471, 480.

“No previous lawful possession, as in the crime of embezzlement, is necessary in order to the commission of this offense; nor is it material by what means, contrivances, or devices the abstraction of its funds from the possession of the bank is effected and accomplished. It may be done by one act or a succession of acts, or it may be effected by fraudulent schemes and contrivances, under the color of loans, discounts, checks, or entries. The methods of its accomplishment do not change the character of of the act. If the ultimate result is to wrongfully obtain funds or moneys of the bank, without its knowledge or consent, and convert the same to the wrong-doer’s use and benefit, the instrumentalities resorted to or employed to effect that end in no way change the criminal character of the act.”

and again:

United States vs. Breese, (Dist. Ct. N. C., 1904) 131 Fed. 915, 921.

“Abstraction, under section 5209, Rev. St.

(U. S. Comp. St., 1901, p. 3497), is the act of one who, being an officer of a national banking association, wrongfully takes or withdraws from it any of its moneys, funds, or credits, with intent to injure or defraud it, or some other person or company, and, without its knowledge and consent, or that of its board of directors, converts them to the use of himself, or of some person or company other than the bank. No previous lawful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished. It may be done by one act, or by a succession of acts. It may be done under color of loans, discounts, checks, and the like. The means used do not change the nature of the act. If the necessary or natural result is to wrongfully withdraw funds or moneys of the bank, without its actual knowledge and consent, by its board of directors, and to convert the same to the use and benefit of the abstractor, or to that of some person or company other than the bank, the means resorted to are of no consequence, and in no way affect its criminal nature."

Finally, it may be stated with respect to these six alleged omissions in the indictment that there is no merit in the contention that these averments should be made because in the language of the court in the case of *United States vs. Britton*, 107 U. S.

662, "neither of these averments is required by the statute."

4. (Defendant's brief, p. 45).

Defendant contends that the grand jury intended to charge the defendant with a misdemeanor and not a felony, and on this point there is no dispute, and it is submitted that they have successfully done so.

5. (Defendant's brief, p. 46).

Error is claimed in the indictment because it does not state that the abstraction was made "without the knowledge and consent of the board of directors of the First National Bank of Roseburg."

There will be no contention between the parties to this case that an allegation of that nature is an essential one to the indictment, but if counsel for the defendant contends that the allegation can be made only in the words which he has quoted, there is considerable contention.

The indictment, in following the example made in the Northway case, averred that the defendant was president of a certain national banking association, to-wit, "The First National Bank of Roseburg, Oregon, theretofore duly organized and established and then and there existing and doing business at the city of Roseburg, in the county of Douglas, within the state and district aforesaid, under the laws of the United States," and further averred that the defendant wilfully and unlawfully abstracted and

converted the money described "without the knowledge and consent of said national banking association," referring, of course, by the word "said" to "The First National Bank of Roseburg, Oregon," which allegation, in turn, can mean the consent of no other body than the directorate by and through which the national banking association acted.

6 (Defendant's brief, p. 49).

The indictment is claimed insufficient because of a lack of allegations that the (a) First National Bank of Roseburg was a national banking association organized under the laws of the United States; (b) that the bank was doing business at the city of Roseburg, Oregon, at the time of the offense charged; and, (c) that the bank was situated in the district over which the court had jurisdiction;

A reading of the indictment will disclose that these matters are all therein alleged, and that they are not alleged by way of recital as claimed by defendant, but as averments of fact in an approved form.

7. (Defendant's brief, p. 55).

It is next claimed that the charge that the money was abstracted and converted to his "the said Thomas R. Sheridan's own use, benefit and advantage, and to the use, benefit and advantage of one B. C. Agee," is ambiguous, uncertain and unintelligible because it does not allege which part, if any, was received by either or both of these parties.

If the money of a bank was unlawfully abstracted by the defendant without the authority of the bank, and with intent to defraud the bank and its depositors, the crime alleged has been committed. The question whether he personally used it or any portion of the money abstracted does not affect the crime.

As disclosed by a discussion of the elements of this offense heretofore mentioned on page 28 of this brief, the final disposition of the money is not a part of the offense. This principle is contained in the following quotation of the court:

Bresse vs. United States (C. C. A. 4th, 1901),
106 Fed. 680, 688:

“An effort was made to show that some of the money which the indictment charged was embezzled, abstracted, and misapplied by W. E. Breese was drawn out for his children. It is difficult to see how this could determine the character of the transaction. If it be true that the defendant took the funds of the bank illegally, how can it affect the transaction whether he took it for his own pleasures, or to pay some debt to a third person, or to restore to his children money belonging to them, which he had used? The purpose of the statute is to preserve the moneys, funds, and credits of the bank for legitimate bank purposes, and to meet obligations incurred in its business. It therefore makes it a criminal offense to misapply and

convert the funds of these banks, without regard to the fact that the person so misapplying them received from the misapplied funds any benefit or advantage for himself, or intended these for others. U. S. vs. Lee (C. C.) 12 Fed. 819.”

And, as the trial judge in this case very tersely remarked, “what difference does it make what he did with the money?” (Tr. p. 68).

8. (Defendant’s brief, p. 55).

It is assigned as error in that two distinct offenses are charged, that the indictment states the defendant “wilfully and unlawfully abstracted and converted and **caused to be abstracted and converted**” the money described. It is claimed that in addition to alleging abstraction, a second offense of wilful misapplication is charged.

The terms “abstract” and “misapply” are both used in section 5209 Revised Statutes, as describing two entirely different crimes. The word “abstract,” unlike the word “misapply” as used in said section, is not ambiguous because it does not appear from other sections of the national banking act that there are two or more kinds of abstracting, both unlawful, but only the one described and punishable as a criminal offense. The word “abstract” as used in the statute, therefore, has but one meaning, being that which is attached to it in its ordinary and popular use. It is to be accepted with that meaning when

framed in an indictment under this section.

United States vs. Northway, 120 U. S. 334,
335.

Furthermore, it is equally the act of the defendant in his abstraction whether he personally abstracts the money or personally causes the money to be abstracted for his use and benefit, the expression, "abstracted and caused to be abstracted," or "he mailed or caused to be mailed," or "placed or caused to be placed," have been repeatedly used and sanctioned in all courts as proper pleading. The citation of authority to such a use and established method of pleading is unnecessary.

9. (Defendant's brief, p. 56).

It is claimed as error that the indictment charges intent "to injure and defraud said national banking association, **and** said depositor and creditor therein," because there could not have been, under any construction, an intent to defraud both bank and depositor.

The statute states the act, when accompanied by other elements, is criminal when done "with intent
* * * to injure or defraud the association or
* * * any individual person." The money being the property of the bank (1, *supra*) a taking of it without the bank's consent accompanied by the other elements of the crime certainly disclose facts from which the jury could find an attempt to defraud the banking association, and a similar finding

could be made by the jury when the taking, coupled with the other elements of the crime, was made without the authority of the depositor.

10. (Defendant's brief, p. 57).

It is claimed that there is error in the first and fourth counts of the indictment for the property therein described as abstracted was the property of the depositors because the indictment does not then allege that the property was abstracted "without the knowledge and consent of said depositors."

This is another straw man built up by defendant's counsel to be summarily dealt with. The property is not the property of the depositors and so far as the knowledge and consent of the depositors was concerned the same was not made an element of the crime charged in this case, but could be used only as a justification for the acts charged to be crimes. And let it be understood at this point as applying throughout this brief that the crime in this case was the taking of this money without the knowledge and consent of the First National Bank of Roseburg, and that all testimony and claims made with regard to the lack of consent of the depositors merely deals with the defense that the defendant endeavored to establish in this case, that the taking by the defendant of the money of these depositors was as their agent, a defense which he was not able to establish.

11. (Defendant's brief, p. 57).

Error is claimed in that the indictment does not describe any property of a nature that it could be unlawfully abstracted within the meaning of the criminal section in connection.

Ignoring the proposition that the property abstracted might be the depositors and answering the proposition that the money, being the property of the bank, it was then only a chose in action and could not be abstracted. It is certain that the statute in its broad language of "money, funds and credits" covers every kind of property which could be placed by a depositor in a bank.

This alleged error is approaching the same question from another point which we have previously dealt with under section 3-b.

12. (Defendant's brief, p. 58).

Error is alleged in the charges of the indictment in that the money obtained by the defendant was not by abstraction, but under false pretenses, which is not an offense against the United States.

The word "abstract" as used in section 5209 is not a word of settled technical meaning like the word "embezzle," as used in the statute defining the offense of embezzlement, and the words "take, steal and carry away," as used to define the offense of larceny at common law. It is a word, however, of simple popular meaning. It means to take, withdraw from, so that to abstract from the funds of a

bank, or a portion of them, is to take and withdraw from the possession and control of the bank all moneys and funds alleged to be so abstracted. To constitute that offense, within the meaning of the act, it is necessary that the moneys and funds should be abstracted from the bank, (a) without its knowledge and consent, and (b) with the intent to injure and defraud it or some other person.

These elements are here alleged and, it is submitted, proved, thereby fulfilling all requirements in this particular of the statute.

Further than this, the argument relating to the lack of criminal allegations concerning the taking of this money by means of a memorandum check, has been dealt with in a previous section (3-c, *supra*), of which alleged error this is but another angle of approach.

13. (Defendant's brief, p. 58).

Only the ingenuity of astute counsel could have conceived of the alleged error in the indictment in not charging an injury to the bank because the indictment does not in addition to charging an injury by the abstraction of certain funds also charge that the memorandum check was not as valuable as the money alleged to have been abstracted by means of it.

As disclosed by the testimony of the defendant (Tr., p. 213), these memorandum checks were given to the bookkeeper, passed through the regular form

by him, written up and the sums thereon charged to the party's account from which the money was drawn. The memorandum checks are before the court in this case, and it can be observed they are not promises to pay the obligation, but administrative means used within the bank for the means of charging one account with money withdrawn or the transference of money from one account to another.

Defendant's counsel builds up a theory that the memorandum check was a negotiable instrument but it does not contain any of the element of negotiability. (L. O. L., Sec. 5834.)

As before stated, the indictment charges the elements of this offense, and further ^{allegations} requirements are unnecessary.

United States vs. Britton, (supra).

DIVISION II.

Instructions to the Jury Requested by the Defendant.

The objections stated from page 59 to 71 of the defendant's brief relating to a requested instruction which it is claimed the evidence supported, and the alleged authority of the defendant with regard to the bank deposits, is ambulatory in its nature, but it seems to be comprised of three elements which will be taken up separately and discussed.

Defendant's counsel excepted to the refusal of the court to a requested charge that the president

of a national bank who has full charge of making loans on behalf of the bank, has a right to lend any portion, or all, of the money deposited in the bank by depositors on general checking accounts without first obtaining permission from the depositor or depositors so to do. This requested instruction was properly refused, ~~for, as we shall hereinafter~~

This requested instruction was properly refused, because this is not a case where the defendant loaned the funds of the bank for the bank. What he did was to take the money from the account of the depositor, convert it to his own use and employed the agency of a note in favor of the depositor as a mere subterfuge.

It was claimed by the defense, as we shall also hereinafter indicate, that his authority to make these loans, if any, arose from an authorization given by the depositors. Therefore, instructions relating to authority of a president to make these loans and given by the bank were immaterial.

The second element of this general objection is that the relation of debtor and creditor having been established, the bank could not hold any money for the sole use and benefit of any of its depositors. This is inconsistent with the claim of the defense made in Division I, Section I.

The conclusion drawn to the effect that the bank is the debtor and the depositor is the creditor, and that the bank owns absolutely the funds placed therein by a depositor on a general checking ac-

count, is correct as indicated by the authorities cited by the defendant. The claim, however, that the bank cannot hold money for the sole use and benefit of a depositor is not correct, and the error that counsel makes in claiming that no crime was either stated in the indictment or disclosed by the evidence with respect to the money being held "for the sole use and benefit" of any depositor, is that he assumes that "for the sole use and benefit" refers to a special deposit and not a general deposit creating the relation of debtor and creditor between the bank and its patron.

The allegation "for the sole use and benefit" of a particular depositor does not, of course, mean, and it requires some addition to secure the construction, that this was a particular deposit in which the identical money placed in the bank by its patron was to be returned.

Not only does it require some addition to secure that construction placed upon the allegation by defendant, but the authorities we have cited state there is a presumption against such an addition.

Bank of Blackwell vs. Dean (1900), 9 Okla. 626.

The indictment should be read as a whole, and in this particular there is contained in each count an allegation that the money, funds and credits abstracted were those "of said national banking association, of the value of" a certain sum. This allega-

tion also negatives the strained construction counsel places upon the phrase, "for the sole use and benefit," and shows that the relation here was that of debtor and creditor rather than as counsel would contend that relation "peculiar to banking business" of bailor and bailee.

The phrase, "for the sole use and benefit" of a depositor, means, as expressed by Michie in his works on "Banks and Banking," volume 2, page 887, that "where a party confides a sum of money to another, he must return to him, on demand, the like sum and not the identical money, the transaction is a simple deposit." Further argument hereon is unnecessary.

This brings us to the third element of alleged error in this general objection from page 59 to 71 of defendant's brief, and that relates to the authority with which the defendant claims himself invested for the purpose of taking this money, and is raised by the claim of defendant that the facts shown by the evidence establish (p. 67) that a national bank through its board of directors appointed its president as its managing agent and trusted him with the possession of the money of the bank for the purpose of lending it.

It may be remarked in passing that the facts claimed to be established in the two groups of facts mentioned in the defendant's brief on page 66 and 67 are not established by the evidence in this case.

Relating to the defendant's authority to take this money, it is shown by the evidence and admitted by the defendant in his own testimony, (Tr., pp. 212, 213, 214, 215, 216, 217, 219, 220), that the money of these depositors was **taken from the bank** by himself.

There are only two sources of authority which could vest the defendant with the right to abstract this money:

1. The bank, by its board of directors, might give authority to make property loans out of the reserve fund of the bank;

2. The depositor might authorize the defendant to make a loan for him, the depositor, out of his individual account.

Taking them up in order we observe as follows:

1. It is conclusively shown that no authority was derived by the defendant from the bank or its board of directors, for two reasons:

- (a) The directors could not authorize a loan out of the depositors individual accounts any more than they could go into his pockets and take his money. Their authority is limited to legal transactions.

Breese vs. U. S., (C. C. A. 4th, 1901), 106 Fed. 680:

“Apart from this, the language of the requests is broad enough to mean that, however fraudulent and illegal the acts of the defendant

were, if they were permitted, sanctioned, or ratified by the other officers of the bank, they were not unlawful. A startling proposition. The most formal vote of the board of directors could not authorize the embezzlement, abstraction, or willful misapplication of the funds of the bank. *Minor vs. Bank*, 1 Pet. 44, 7 L. Ed. 47. The authority of the officers of the bank and of its board of directors extends only to legitimate transactions honestly intended for the benefit of the bank. *U. S. vs. Harper (C. C.)* 33 Fed. 484."

(b) It is admitted that the minute book (Government's Exhibit No. 5) of the First National Bank contains nothing about the directors authorizing Thomas R. Sheridan to loan money out of the depositors' accounts by means of the memorandum checks or otherwise.

After witness S. A. Sanford had identified Government's Exhibit No. 5, and stated it contained a list of the meetings and business transactions of the board of directors of the First National Bank of Roseburg, the following questions were asked by Mr. Reames to answers and statements of counsel made as follows:

Q. Was the matter of the drawing of these memorandum checks on the accounts—

Mr. Fulton: If that is your purpose in that examination I will say that we do not contend

that any of these matters were taken up with the board of directors.

Court: I don't think it is necessary anyhow under the statute.

Mr. Fulton: I don't think so either.

Court: But it is conceded they were not.

Mr. Reames: It is stipulated it is not necessary?

Mr. Fulton: No, the court says it is not necessary, I don't stipulate. I don't say what my position is in the matter, I mean what the law is, but we do concede there is nothing in the minutes about it.

Q. Did the bank so far as you know ever give its consent to the drawing of those memorandum checks by Mr. Sheridan?

A. No, sir.

Q. And if it had given—

Mr. Fulton: Now, that is objected to, the question is, what has the bank.

Court: The board of directors are the managing officers of the bank.

Mr. Fulton: I don't think they have a right to ask that question in that way. If it is material that is not the way to prove it. The board of directors, as Your Honor says, is the bank so far as exercising the powers and functions of the corporation are concerned. That is all there is of it.

Mr. Reames: I would like to ask two questions, if the court please.

Q. Then did the board of directors at any time while you were cashier of the bank ever authorize those transactions?

Mr. Fulton: What the board of directors did is proven by the minutes. The minutes we concede have nothing. I can't see why counsel insists on this, but what the board of directors did is proven by their records and they didn't do anything.

Court: I think the records are *prima facie* evidence of what they did and if they contain no evidence of what they did and if they contain no evidence of it the presumption will be that they did not.

Mr. Fulton: Of course, we contend—our position is that so far as the board of directors are concerned they could not have given the authority to make a loan for these parties, the parties alone would give that authority. We are claiming our authority anyway from these parties."

Under the statute charging this crime and under the allegations of the indictment declaring the same and under the authorities defining the crime of abstraction it was incumbent upon the government to prove that the taking of this money from the individual accounts of the depositors was without the

knowledge and consent of the directors of the First National Bank of Roseburg.

The minute book, (Government's Exhibit No. 5) is in evidence. It is the only means of disclosing whether or not the directors of the First National Bank of Roseburg authorized the defendant to make any loans. It is silent thereof. It is admittedly silent. The government has so proved this element of its case.

Authorities further discussing this principle we have just announced are as follows:

The case of the United States vs. Northway, 120 U. S. 327, holds that to constitute abstraction within the meaning of the act, it is necessary that the ~~property~~ ^{property} evidence should be abstracted from the bank without its knowledge and consent. Cases holding a similar principle are,

United States vs. Harper, 33 Fed. 471, 479;

United States vs. Martindale, 146 Fed. 283;

United States vs. McKnight, 115 Fed. 115.

But it may be said at this point that the consent of the association cannot be given by any officer in bad faith, and that the authority of every officer is limited to transactions carried out in the honest exercise of discretion, and in the belief that they will accrue to the benefit of the bank.

United States vs. Breese, 131 Fed. 926, wherein the court said:

"If such loans, or discounts, or overdrafts,

are made or permitted in bad faith for the purpose of personal gain, or for the private advantage of the officers, and not, therefore, in the honest exercise of official discretion, they do not give the consent of the bank, and the defendant would not be predicated by said authority so given, if he was a party to such transaction. * * * The authority of the directors and the officers and committees of the bank extends only to legitimate transactions intended for the benefit of the bank."

Breese vs. U. S., 106 Fed. 684, 685;

U. S. vs. Tainter, 11 Blatch. 374;

Minor vs. Bank, 1 Pet. 46, 71;

U. S. vs. Eno, 56 Fed. 218.

In *Minor vs. Bank*, 1 Pet. 46, 71, Mr. Justice Story said:

"However broad and general the powers of the directors may be, for the government and management of the concerns of the bank, by the general language of the charter and by-laws, those powers are not limited, but must receive a rational exposition. It cannot be pretended, that the board could, by a vote authorize the cashier to plunder the funds of the bank, or to cheat the stockholders of their interest therein. No vote could authorize the directors to divide among themselves the capital stock, or justify the officers of the bank in an avowed embezzlement of its funds. The

cases put are strong, but they demonstrate the principle only in a more forcible manner. Every act of fraud, every known departure from duty, by the board, in connivance with the cashier, for the plain purpose of sacrificing the interests of the stockholders, though less reprehensible in morals, or less pernicious in its effects, than the cases supposed, would still be an excess of power, from its illegality, and, as such, void, as an authority to protect the cashier, in his wrongful compliance. Now, the very form of these pleas, sets up the wrong and connivance of the board as a justification; and such wrong and connivance cannot, for a moment, be admitted as an excuse for the misapplication of the funds of the bank, by the cashier."

Nor was it ever contended by counsel for defendant at the trial of this cause that there was any authority from the directors of the bank for the abstractions made by this defendant. Mr. Fulton, the defendant's counsel, at the trial stated:

"Now, it all depends on what the agreement between the parties was, whether or not Mr. Sheridan had a right to take that money and use it for himself or loan it to others; all upon the agreement."

"It is not proved that he had the authority, it is not proved that he didn't have the authority, or the fact that he used the money. Whether

he did depends upon what the parties said. Now, he says the authority only went to the \$500, we say the authority went to the whole, but that is a matter of dispute between the parties, of course. The fact that he used it for another transaction, got \$800, does not tend to prove one thing or another, because it all rests upon what the agreement between the parties was, and that does not tend to prove or disprove the agreement between the parties; at least I can't see that it does. If our statement is correct he had a right to it; if his statement is correct it was limited to a certain one, and it all goes back to what the real agreement was between the parties, and his using it for this other only tends to complicate the situation, and I think the testimony ought to be confined to the charge in the indictment, as to whether or not that was in excess of his authority." (Tr., pp. 54, 54.)

The question of legal authority of the defendant Sheridan as given by the bank was never claimed, nor the question was never raised in the trial court, and an assignment of error cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon so as to give the court of appeals jurisdiction.

Ansbro vs. U. S., (1895), 159 U. S. 695, 698.

With this showing upon the part of the government in satisfying the elements of the crime as named in the statute, it devolved upon the defendant to show authority and this authority he claimed was secured from the depositors.

2. The question of authority of defendant Sheridan to withdraw the individual deposits of patrons of the First National Bank of Roseburg, as given by the depositors, may be disposed of with brevity.

This was the admitted issue on the element of authority. The issue was one of fact. The government offered its testimony of lack of authority, and the defendant offered his testimony of the grant of authority. The jury decided on this question of fact by their verdict that there was no authority. The finding being one of fact, with evidence to support it, it is binding upon the Circuit Court of Appeals.

II. (Defendant's brief, p. 71).

It is claimed that the evidence demonstrates that no money was ever abstracted by means of a certain memorandum check.

As hereinbefore stated, the means of abstraction is immaterial.

III. (Defendant's brief, p. 72).

Objection is here made that the evidence does not show that any money, funds, or credits have been abstracted or converted from the bank by the defendant.

Discussing the two points upon which conviction was made:

Count one is with respect to David Hull, and the evidence showed that his account was debited March 7, 1911, with the sum of \$230, and B. C. Agee's account was credited \$230. (Tr., p. 66.)

The memorandum check (Government's Exhibit No. 4) showed how it was drawn out of David Hull's account, and the deposit slip (Government's Exhibit No. 7), showed how the \$230.00 was credited to B. C. Agee's account (Tr., p. 64, 65). The promissory note dated March 4, 1911, for \$230.00 in favor of David Hull, and signed B. C. Agee, by T. R. S., (Government Exhibit No. 6), was admittedly in the handwriting and signed by the defendant, and since Thomas R. Sheridan and B. C. Agee were in partnership (Tr., p. 102), and the defendant repeatedly admitted taking these moneys, and with respect to David Hull's money, the defendant testified that

"Mr. Hull came to the bank and asked me if I could not get some interest for him from his money; he said he didn't want it to lie idle; I told him 'Yes'; I told him I could use it, and he said all right. * * * I loaned it from time to time and as the loans were paid for I would give him credit in the books and then loan it out again." (Tr., p. 212.)

It was probably apparent to the court below

that the money, funds and credits of the First National Bank of Roseburg were abstracted.

With respect to Count Four, relating to depositor Laura M. Verrell, the evidence showed that on April 15, 1911, her account was debited \$5,000, and that that sum was "loaned by T. R. S.," as stated on the ledger, and that said sum was transferred to the account of Thomas R. Sheridan on the books of the bank (Tr., p. 88), and memorandum check dated April 15, 1911, for \$5,000 against the account of Laura M. Verrell, was signed by the defendant in his own handwriting (Government's Exhibit No. 9), (Tr., p. 73), and shows how the money was abstracted from the Verrell account. A promissory note dated April 15, 1911, for \$5,000, due one year after date, in favor of Laura M. Verrell, was admittedly in the handwriting and signed by the defendant, (Government's Exhibit No. 10), (Tr. p. 74), upon which no credits have been paid.

This, together with the defendant's admissions of the taking (Tr., 215, 216):

"I asked her if she wanted to lend that money out, and she said she did; she said she did not know exactly who to trust, and I asked her if she would trust me, which she said she would. Well, I told her as soon as I was able to place it I would advise her and charge her account and put the document in the usual place, which I did." (Tr., p. 215.)

“She said that all she wanted to know was that she was going to get it some time; and I told her that if I lived I would surely pay her; and she said that she was glad to hear me say so, and after a few other casual remarks we parted.” (Tr., p. 216.)

probably convinced the trial court and jury that the money was abstracted and converted from the bank.

Regarding the general testimony that the moneys, funds and credits of the bank in the accounts of other depositors have been taken from the bank, we call the court's attention to the following statement of the defendant himself:

“This (meaning the conversation regarding the desire of the depositor for interest) was before I took the money, and all these transactions were before I took the money.” (Tr., p. 213.)

Speaking of whether or not the money was taken from the bank in the account of W. J. Carlon, the defendant said:

“So I took it.” (Tr., p. 213, also 214.)

With regard to the taking of the money from the bank in the account of J. E. Haney, defendant testified:

“Mr. Haney asked me if I could not get some interest for him, that there was too much money there; I told him I could and he told me that I could take it and use it in any way I wanted to, but he wanted my endorsement, and

pursuant to that I took the money.” (Tr., p. 216.)

With regard to the taking of the money from the account of C. E. Marks, was testified to by the defendant, as follows:

“Mr. Marks told me he could not afford to leave his money lying idle, he wanted me to handle his money, which I did.” (Tr., p. 217.)

And the following statement was made by the defendant with regard to taking the money from the bank in the account of W. E. Chapman:

“Like the rest, he came in and said he wanted some interest on his money and he told me to loan it, which I did.” (Tr., p. 219.)

And from the bank and the account of Joseph Mosthaf:

“He had a water and light bond and after that was paid he told me that he wanted to put the money out again, and told me to take it and dispose of it as I saw proper; that is to keep it, and I did as he authorized me to, and put in a memorandum check and a note in the vault just the same.” (Tr., p. 220.)

And from the bank in account of Wm. Wende:

“I used his \$1010 at his request; he requested me to use it and I did.” (Tr., p. 220.)

And other abstractions were indicated by implication from the testimony.

The defendant's own admissions are surely suf-

ficient to show that the money was taken from the bank even arguendo if the government's theory of the application of evidence of a depositor to another account was not sufficient abstraction.

III-b. (Defendant's brief, p. 79).

The objection here raised is answered in the preceding section.

III-c. (Defendant's brief, p. 80).

The objection is next made that there was no "conversion," and the authorities are correctly cited to the test of conversion.

But on page 80 of plaintiff's brief, citing *U. S. vs. Morse*, 161 Fed. 429, it is quite apparent that the bank could have maintained an action against Thomas R. Sheridan, because he had abstracted and caused to be abstracted, money from the accounts of the depositors without the consent of the board of directors of the bank, and the defendant admits having used these moneys for his own purpose.

IV. (Defendant's brief, p. 83).

The next objection to the evidence is that there were no facts shown from which the intent of the defendant to defraud could be inferred.

INTENT TO INJURE OR DEFRAUD.

The intent to injure or defraud is an essential ingredient of every offense specified in the statute.

U. S. vs. Lee, 12 Fed. 816,

U. S. vs. Harper, 33 Fed. 471.

But this intent may be inferred upon the presumption that every man intends the natural and ordinary consequences of his acts.

“The law presumes that every man intends the legitimate consequence of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed. It is a well settled rule which the law applies in both civil and criminal cases that the intent is presumed and inferred from the result of the action. Intent to injure is not necessarily an intent to wreck a bank.”

Agnew vs. U. S., 165 U. S. 53,

In U. S. vs. Youtsey, 91 Fed. 471, the court (Taft, J.), said:

“If, therefore, the funds, moneys or credits of the First National Bank of Ocala are shown to have been either embezzled or willfully misapplied by the accused and converted to his own use, whereby as a necessary or legitimate consequence the association’s capital was reduced or placed beyond the control of the directors, or its ability to meet its engagements or obligations or to continue its business was lessened or destroyed, the intent to injure or de-

fraud the bank may be presumed."

The latter case shows what is meant by "injury." This does not mean the total destruction of the bank. A mere withholding of funds is enough. Thus, in the case of *U. S. vs. Kenny*, 90 Fed. 264, p. 265, 266, checks were drawn by the defendant and paid by the bank, but withheld from his account for varying periods of time. They were later repaid to the bank by the defendant, and it was held that the bank was deprived of the use and control of its funds during those respective periods. This was held to be a loss and injury to the bank.

It is not necessary that the defendant adopt fraudulent means; the intent of the act controls not the manner of its execution.

"It is not necessary that a discount be procured by fraudulent means since the offense consists not in the use of fraudulent means but in the discount of a note which both parties knew to be unsecured, with intent thereby to defraud the bank. The argument of the defendant assumes that under no circumstances is the discount of a note, to all parties known to be worthless, an offense under the statute, even though such discount be made for the deliberate purpose of defrauding the bank out of the proceeds of the note so discounted. We do not see how it is possible to give such an interpretation to the statute without a practical nullifica-

tion of its provisions.”

Evans vs. U. S., 153 Fed. 590.

The statute may be satisfied with an intent to injure some other company, body politic or corporate, or individual person than the banking association whose property is abstracted.

U. S. vs. Northway, 120 U. S. 327-335.

The presumption of intent may under certain circumstances become conclusive.

“The act of the defendant renders the association liable to a forfeiture of its charter. Still further it casts upon the bank a risk which attached at the instant of the doing of the act, and this a risk notoriously great and extraordinary in character and outside the bounds of proper commercial use. **It placed the capital of the bank beyond the control of the officers** of the association, and it was an unlawful dealing with the money of the corporation belonging to a class of institutions whose welfare is intimately connected with the public welfare.

* * *

The act of the defendant, therefore, necessarily involved injury not only to the association, but also in a proper sense to the public. An act having such consequences when knowingly done discloses moral turpitude and cannot be innocent. It may, therefore, well be held that proof of such an act proves **con-**

clusively an intent to injure, because when knowingly done it affords no opportunity for justification or legal excuse and manifests so clearly a general guilty intent as to make it of no consequence what other particular intent coexisted therewith, and to preclude inquiry as to such other intent or into the motives which impelled to its commission. A generous motive is not inconsistent with a guilty intent, and proof of the one does not disprove the other.”

U. S. vs. Tainter, 11 Blatch. 374-376.

Personal gain is immaterial.

Breese vs. U. S., 106 Fed. 684.

The use of the words “to injure” as contrasted with the word “defraud” is important.

U. S. vs. Tainter, 11 Blatch. 374-376.

“Where a president of a bank charged as a trustee with the administration of the funds of the bank in his hands converts them to his own use, he embezzles and abstracts them without the statute referred to unless he shows authority for so doing.”

Can Campen’s case, 2 Ben. 419, p. 425.

The question of intent to defraud being one of fact, the jury, from the evidence disclosed showing that there was no authority from the bank and none from the two depositors in question, probably concluded there was such an intent to defraud as was alleged in the indictment.

(There is no section V in defendant's brief.)

VI. Defendant's brief, p. 89).

It is claimed that the evidence shows embezzlement rather than abstraction. Very little argument is needed to refute this contention. There are two fallacies in the argument given to support defendant's contention. One is based on the assumption that the defendant as "possession" of the moneys claimed to have been abstracted. The possession of the money was apparently in the national banking association of which the defendant was but an officer. Abstraction differs from embezzlement in that "no previous lawful possession as in the crime of embezzlement, is necessary in order to constitute the commission of this offense." Nor is it material by what means, connivance or device the abstraction of the funds from the possession of the bank is effected. The ultimate result is the wrongful obtaining of moneys, and funds of the bank without its knowledge or consent, and to convert the same to the wrongdoer's own use.

U. S. vs. Harper, 33 Fed. 480.

The other fallacy is the assumption by defendant that he was the managing agent of the bank to make loans of the character of these in question. We have previously shown that he had and could have had, no such authority as to loan from the individual accounts of these depositors. (See Section I, Division II, this brief.)

VII. (Defendant's brief, p. 94).

It is further claimed the offense shown by the evidence is maladministration and not abstraction.

In abstraction there is, of course, a general maladministration, but wilful abstraction of moneys, funds and credits of a banking association is made an offense by section 5209 of the Revised Statutes, and is different from the acts of official maladministration referred to in section 5239, Revised Statutes. In this indictment the elements of abstraction are alleged and, it is submitted, proved.

VIII. (Defendant's brief, p. 100).

It is claimed that the evidence discloses making a false entry and not abstraction.

There is no false entry because it cannot be a false entry to make a recital on the books of the bank which speak the truth.

U. S. vs. Young, 128 Fed. 115.

"False" means wilfully and intentionally false, with intent to deceive.

U. S. vs. Allen, 10 Bliss 90.

Here all the entries made show the money abstracted from the individual depositor's account, and later admittedly abstracted from the bank, and all these entries are true.

It is also clear that the making of a false entry is a concrete offense which is not committed when the transaction entered actually took place and is entered exactly as it occurred.

Coffin vs. U. S., 156 U. S. 463.

Coffin vs. U. S., 162 U. S. 684.

Any entry in the books of a bank which is intentionally made to represent what is not true, does not exist, with intent either to deceive its officers or defraud the association, is a false entry within the meaning of the statute making this a criminal offense. It is apparent that this is not the crime charged nor proved.

IX. (Defendant's brief, p. 101).

It is claimed the evidence disclosed the obtaining of money under false pretenses and not abstraction.

In a sense there is a false pretense on the part of the defendant in claiming that he had authority to take this money when in truth and in fact no such authority existed, but there is no crime against the United States in this particular of obtaining money under false pretenses, but there is a crime of abstraction, the elements of which are alleged and proved; and this subject has been previously dealt with under Division I, Section XII.

It must be somewhat embarrassing to the defendant to have his counsel attach so many criminal attributes to the single criminal act alleged by the government.

X. Defendant's brief, p. 101.)

It is claimed that error occurred in the court's

admission of testimony that the account of the person to whom the money was loaned was in overdraft at the time of said loan (Tr. pp. 67-70). The court announced with regard to this proof of the overdraft in the B. C. Agee account, that,

“Mr. Fulton: I want to make this clear if I can, as my position; he is not to be held liable for any unwise investment of the money or use of the money. If he had a right to take the money, because he didn’t wisely invest it or wisely loan it, is immaterial, the question is, did he have authority directly or implied, to take that and use it, either for himself, or loan it?

Court: If that were the only issue in the case I would sustain your objection without hesitation, but such a wide field is thrown open on the other question and it is so hard to limit testimony to its proper sphere. I will permit him to answer the question, but, as I say, it doesn’t prove anything, one way or the other.” (Tr. p. 70).

Furthermore, to be reversible error, it must be shown where the testimony was prejudicial to the defendant, and no such showing is made.

Again, it is shown that J. E. Haney had \$5,500 in the bank, which was evidently taken out in favor of the defendant, after which J. E. Haney drew against his account putting it in overdraft \$170.50. (Tr. p. 111, 112).

However, it is the theory of the government that proof of these collateral facts of overdraft were and are admissible on the ground of intent with which the defendant overdrew these accounts.

Breese vs. U. S., (C. C. A. 4th, 1901), 106 Fed. 680, 684.

XI. (Defendant's brief, p. 102.)

It is claimed if the abstractions were made they were made with the knowledge and consent of the National Banking Association because the defendant was the managing agent of said concern.

There is no proof in this case that the directors of the First National Bank of Roseburg ever authorized the defendant to act as its managing agent for the purpose of making loans, and they are the only parties who could give such authority to the defendant.

XII. (Defendant's brief, p. 103.)

The alleged error herein contained relates to a requested instruction, as follows:

“There is some testimony on the part of the prosecution tending to show that in some instances a depositor authorized the defendant to take his or her money then on deposit in the bank and loan it on good security and that defendant thereupon took the money and used it himself, placing his personal note in the bank for it. The defendant, however, contends that in all such cases the depositor authorized him

to use the money himself, if he desired so to do. I instruct you, however, that so far as this case is concerned, if you find that as to any sum of money mentioned in any count of the indictment the defendant was authorized to take the same but instructed to loan it on security only and that he thereupon took the money and used it himself, you cannot find him guilty for so doing, for in such case he had authority to withdraw the money from the bank and if, after withdrawing it, he did not loan it as directed but used it himself, he did not thereby violate the statute under which he is being prosecuted here.” (Tr. p. 270, 271.)

This instruction was in reality given in the trial court and in better phraseology and as a clearer statement of the law, as follows:

“The principal question for your consideration will be—or at least the first question for your consideration will be: Was the defendant authorized by the depositors to withdraw these moneys? If you find from the testimony in this case that he was so authorized or if you find from the course of dealing between the defendant and the depositor that the defendant had reasonable cause to believe and on good faith did believe that he was so authorized, then he is not guilty of the crime here charged. But if you are satisfied beyond a reasonable doubt that he had no authority from the depositor to

withdraw the funds, and if you further find that he had no reasonable cause to believe and did not in good faith believe that he had such authority, then his abstraction of the funds was wrongful, and the crime is complete if you find that the abstraction was made with the intent to injure or defraud either the banking association or the depositor." (Tr. p. 233, 234.)

This was the language of the judge and he was at liberty to prefer his own language to the language of counsel expressing the same idea.

Tucker vs. U. S., 151 U. S. 154.

The charge as a whole having correctly conveyed to the jury the rule which they were to determine from the evidence the question of intent, there was no error to the prejudice of the defendant in refusing the requested instruction.

Coffin vs. U. S. (1896), 162 U. S. 664, 675.

XII-A. (Defendant's brief, p. 103.)

This is an objection to the admission of evidence of similar offenses for the purposes of showing intent.

The principle is so well established that similar offenses may be introduced to show the intent as to hardly need citation of authority.

However, the following case states the opinion and holds that similar transactions both before and after the principal one in issue, are admissible.

Mr. Justice Story said:

“The question was one of fraudulent intent or not, and upon question of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of a party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable in many cases to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but, taken in connection with others of a like character and nature, the intent and motive may be demonstrated almost with conclusive certainty. They constitute exceptions to the general rule excluding evidence not directly comprehended within the issue; or, rather, perhaps, it may with some certainty be said the exception is necessarily embodied in the very substance of the rule, for whatever does legally conduce to establish the point in issue is necessarily embraced in it, and therefore the proper subject of proof, whether it be direct or only presumptive.”

Wood vs. U. S., 16 Pet. 342.

The above quotation was cited with approval in Breese vs. U. S. (C. C. A. 4th) 106 Fed. 680, 684.

Furthermore, the court concisely and clearly lim-

ited the scope of these similar offenses upon two different instructions to the jury:

1. The court said, upon information from the United States Attorney that the witness now under examination was not one of the witnesses named in the indictment; that,

“I will instruct the jury now, however, that this has no bearing upon the question whatever as to whether or not he (the defendant) was authorized to take out the money of these other persons, and you must not consider the testimony in that light. You can only consider its bearing upon the question as to whether or not the defendant intended to defraud the banking association or any other person or persons.” (Tr. p. 113.)

And in his final instructions to the jury, the court said:

“This, gentlemen of the jury, is the proper place to limit the scope and effect of certain testimony which the court received during the trial. You will recall that the court admitted testimony relating to transactions between the defendant and other depositors of a similar nature to those set forth in the indictment. This testimony was not offered for the purpose of proving authority or a want of authority for the issuance of the particular checks set forth in the indictment. You cannot prove that a man had authority to draw a check for one depositor by

proving that he had authority to draw a check for another depositor at another and different time. The converse of this is equally true. You cannot prove that a man had no authority to withdraw funds from a bank in behalf of one depositor by proving that at another and different time he withdrew funds from the bank belonging to another depositor without authority. So that the testimony as to these transactions outside of those particular transactions set forth in the indictment must not be considered by you in determining the question of want of authority at all. You will not consider this testimony until after you have settled in your own minds beyond a reasonable doubt that the funds mentioned in the indictment were withdrawn from the bank by the defendant without authority from the depositor, real or apparent, as I have defined these terms to you." (Tr. p. 234, 235.)

And as to the additional argument herein, that the defendant was the authorized agent and empowered to make the loans for the First National Bank of Roseburg, this matter has been previously discussed in Division II, Section 1, and much of the argument herein is based upon the false premise that the bank authorized defendant Sheridan to loan this money from the individual accounts of the depositors.

In support of the principle that similar offenses are not admissible to show intent, defendant's counsel cites the case of *State vs. Bokien*, 44 Pac. 889, but in this case the court expressly states (Defendant's brief p. 104), that,

"In this instance, the question of criminal intent, or guilty knowledge, was not in issue," while in the case at bar it is announced by the court and admitted by defendant's counsel, that one of the elements which the government must prove in order to secure a conviction was the element of criminal intent (Tr. p. 113, 114).

XIII. (Defendant's brief, p. 112.)

In this section error is alleged in the court's refusal to direct the jury to return a verdict in favor of the defendant because the evidence did not show an intent to defraud. This alleged error is based on assignment of error 25 (Tr. p. 265); the same point was raised in the trial of embezzlement in the case of *Breese vs. U. S.* (C. C. A. 4th, 1901), 106 Fed. 680, where the court said:

"The twentieth request is that the jury be charged that there was no evidence in the case upon which the jury would be justified in returning a verdict against the defendant on the counts of embezzlement. This was a matter wholly within the judge's discretion. He was not obliged to take the question from the jury, however strong may have been his own impres-

sion.” (P. 685.)

The alleged error is more conclusively answered in Section 15 below.

Error is also claimed under this same section in the court’s denial of defendant’s motion for a new trial.

Such action of the trial court is not reviewable on appeal.

Andrews et al vs. U. S., (C. C. A. 9th, 1915),
222 Fed. 418.

Gilbert, J., said:

“The ruling of the court below in denying the motion of plaintiffs in error for a new trial is not assignaable as error.” (P. 419.)

XIV. (Defendant’s brief, p. 113.)

The quetsion of whether the crime charged in this indictment is a misdemanor or a felony and whether or not the punishment for the crime defined in Section 5209 has been repealed has heretofore been dealt with and needs no further argument.

XV. Defendant’s brief, p. 114.)

It is finally claimed that the evidence does not show that the defendant is guilty of abstraction, and to prove this point defendant cities the testimony, (Brief, p. 115), of David Hull, wherein Hull states that he authorized the defendant Sheridan to take \$500.

As to Mrs. Verrell signing the so-called release authorizing an act which had already been committed, the witness explained that she did so after interviewing the defendant, and his assurance to her that the letter was all right (Tr., p. 80.) The defendant Sheridan told her before she received this letter that she should sign it. (Tr., p. 78, 88.)

This statement is corroborated, to some extent, by the defendant's testimony (Tr., p. 218.)

In determining whether or not there is sufficient evidence to sustain the verdict the Circuit Court of Appeals can determine only the question of whether there is **any** evidence to sustain the verdict.

Hedderly vs. U. S., (C. C. A. 9th, 1912), 193
Fed. 551, 571.

And this determination must be made from all the evidence admitted in behalf of both the plaintiff and the defendant.

Burton vs. U. S., (C. C. A. 7th, 1906), 142
Fed. 57, 59.

Stearns vs. U. S., (C. C. A. 8th, 1907), 152
Fed. 900, 905.

And in the determination of whether there is any evidence to sustain a verdict the Appellate Court need only ascertain from the record whether there is any evidence which **if credited by a jury**, is sufficient to sustain the verdict.

Boren vs. U. S., (C. C. A. 9th, 1906), 144 Fed.
801, 804.

And that there is sufficient evidence to sustain the verdict of the jury is found in the above reference and quotation from the transcript of record relating to the question of authority which was in reality the real question at issue herein.

Counsel's familiarity with the indictment must have informed him that the charge of wilful and unlawful abstraction by the defendant from the account of David Hill related to \$230, and not to this \$500 transaction (Tr., p. 6.) And surely authority to take \$500 at one time cannot be construed or enlarged into authority to take all or any portion of the remaining money of David Hull.

As to the authority of the defendant to abstract the \$230, which sum is charged as abstracted in Count One of the indictment, the defendant's brief makes no comment.

David Hull's testimony with regard to the transaction charged in the indictment was:

"I hand you a memorandum check dated March 4, 1911, which I have stated to the court forms the basis of Count No. 1 of the indictment, purporting to have been signed by David Hull, reading to the order of B. C. Agee, amount \$230, and ask you to look at it and say if you signed it. Did you ever sign that?

Answer. No, sir, I never did.

Question. Did you ever authorize Mr. Sheridan to loan your money to Mr. B. C. Agee?

A. No, sir, I never did." (Tr., p. 41, 42.)

As to the witness David Hull testifying that the so-called release of the bank examiner which is claimed by the defendant as authority for the act already committed, the witness fully explained how he signed this statement; (This brief, p. 10.)

As to Count Four and the authority of defendant Sheridan to abstract the money of Mrs. Laura M. Verrell, there was certainly no authority granted by the depositor to the defendant for the taking of this money, (See testimony Mrs. Verrell, pp. 73-81.)

In conclusion, it is submitted that the indictment herein states a crime which testimony, under proper rules of evidence, has proved, and that the mantle of justice which should rest on all alike, demands an affirmation of the pleading herein as well as the trial proceedings and judgment of the court. The transactions of this defendant relating to the deprivation to the bank of over \$42,600, of the money of the First National Bank of Roseburg, should not stand approved.

Respectfully submitted,

CLARENCE L. REAMES,

United States Attorney.

ROBERT R. RANKIN,

Assistant United States Attorney.

APPENDIX A.

Be it remembered that heretofore, towit, on the 14th day of July, A. D., 1885, there was filed in the Circuit Court of the United States for said district a transcript as follows, towit:

The United States of America, in the District Court of the United States for the eastern division of the northern district of Ohio, of the April term, in the year of our Lord one thousand eight hundred and eighty-five.

Northern District of Ohio,
Eastern Division, ss.

The grand jurors of the United States of America, duly impaneled, sworn, and charged to inquire of crimes and offenses within and for the body of the eastern division of the northern district of Ohio, upon their oath, present and find that Stephen A. Northway, late of the division and district aforesaid, heretofore, towit, on the sixteenth day of December, in the year of our Lord one thousand eight hundred and eighty-two, at the county of Ashtabula, in the division and district aforesaid, and within the jurisdiction of this court, was then and there the president and agent of a certain national banking association, towit, "The Second National Bank of Jefferson," which said association had theretofore been duly organized and established and was then existing and doing business at the village of Jefferson and county of Ashtabula, in the division and dis-

trict aforesaid, under the laws of the United States and that he, the said Stephen A. Northway, so then and there, on the date first aforementioned, being president and agent as aforesaid, did then and there, at said village of Jefferson and county of Ashtabula, in the division and district aforesaid, on said sixteenth day of December, in the year of our Lord one thousand eight hundred and eighty-two, wrongfully and unlawfully, and with intent to injure the said association, and without the knowledge and consent thereof, wilfully misapply and convert to his, the said Stephen A. Northway's, own use, certain moneys and funds of the property of said association, of the amount and value of twelve thousand dollars, towit, six thousand dollars in United States notes, commonly called greenbacks, and six thousand dollars in circulating notes of the United States, commonly called national bank notes, and intended to pass and circulate as money, a more particular description of which said United States notes and circulating note aforesaid is to the grand jurors aforesaid unknown, contrary to the form of statute of the United States in such case made and provided, and against the peace and dignity of the United States.

Second Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present and find that the said

Stephen A. Northway heretofore, towit, on the sixteenth day of December, in the year of our Lord one thousand eight hundred and eighty-two, at the county of Ashtabula, in the division and district aforesaid, and within the jurisdiction of this court, was then and there president and agent of a certain national banking association, towit, "The Second National Bank of Jefferson," theretofore duly organized and established, and then existing and doing business at the village of Jefferson and county of Ashtabula, in the division and district aforesaid, under the laws of the United States; and that he, the said Stephen A. Northway, so then and there, on the date first aforementioned, being president and agent as aforesaid, did then and there at said village of Jefferson and county of Ashtabula, in the division and district aforesaid, on said sixteenth day of December, in the year of our Lord one thousand eight hundred and eighty-two, wilfully and unlawfully, and with intent to injure the said national banking association, and without the knowledge and consent thereof, abstract and convert to his, the said Stephen A. Northway's, own use certain moneys and funds of the property of said association, of the amount and value of twelve thousand dollars, towit, six thousand dollars in United States notes, commonly called greenbacks, and six thousand dollars in circulating notes, commonly called national bank notes, and intended to pass and circulate as

money, a more particular description of which said United States notes and circulating notes aforesaid is to the grand jurors aforesaid unknown, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

I hereby certify that the original of which this is a photostatic print is in the possession of the Library of Congress.

ALLEN R. BOYD,

Chief Clerk,

Library of Congress.

April 20, 1915.

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No. 2705

8

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS R. SHERIDAN,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

JOHN L. McNAB,

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JAMES W. RYAN,

Of Counsel.

Filed

NOV 15 1916

F. D. Monckton,
Clerk.

Filed this.....day of November, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2705

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS R. SHERIDAN,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

*To Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The plaintiff in error respectfully petitions this Honorable Court for a rehearing of this cause, upon the following grounds:

I.

By the construction given to the language of the indictment, in holding that the offense charged therein is abstracting money of the bank and not money of the depositors, the majority of the Court have necessarily held that the three instructions of the trial Court to the jury, that the plaintiff in

error was being tried for abstracting money of the depositors, were erroneous and prejudicial to him. Yet, although those specific instructions were excepted to (Tr. Rec. p. 242, lines 13-29; p. 242, line 29 to p. 243, line 10), and assignments of error (Nos. XXXVIII and XXXIX and XL, pp. 272-273, Tr. Rec.) were based thereon, the majority of the Court have overlooked and neglected to even mention in their opinion either those instructions, exceptions or assignments of error, notwithstanding the fact that His Honor, Judge Ross, quotes those instructions in full in his dissenting opinion. Counsel for plaintiff in error most earnestly submit that in view of the decision of the majority of the Court regarding the demurrer, the plaintiff in error is entitled to a new trial because of those erroneous instructions. At the very least he should be granted a rehearing by the Court so that it may consider the exceptions to those instructions and the assignments of error based thereon, because as they are not mentioned in the opinion of the majority of the Court it must be assumed that they were overlooked and not considered.

The construction of the language of an indictment is a question of law. The jury are bound under their oaths to take the law from the Court. *The trial Court in this case charged the jury three distinct times that they were trying plaintiff in error for abstracting money of the depositors and not money of the bank.* The fact that the indictment was capable of the construction that it charged

the abstraction of money of the bank is immaterial in view of the fact that that construction was not placed upon it by the only person entitled under the law to construe it—the trial Judge. Therefore since the trial Court instructed the jury to find the plaintiff in error guilty or not guilty of abstracting money of the depositors, and since under those instructions the jury found as a fact that the plaintiff in error abstracted money of the depositors and not money of the bank, **the plaintiff in error was actually convicted of abstracting money of the depositors** (and not money of the bank), *which is not an offense against the United States.*

A reading of the testimony of the depositors will convince the Court that they believed that the plaintiff in error was being tried for abstracting money belonging to them and not to the bank, and in view of the instructions of the Court it must be conclusively presumed that the jury were of the same belief.

The fact that the plaintiff in error contended that he had been authorized by the depositors to withdraw their money, and the emphasis given to the evidence both for and against that contention, also tended very strongly to confirm the jury in their conviction that the plaintiff in error was being tried for abstracting money of the depositors.

The fact that the two deposits as to which the plaintiff in error was convicted, were deposits of an elderly, nervous and excitable lady, and an

elderly, illiterate man, and that plaintiff in error was acquitted as to all the other deposits, shows that the verdict resulted from sympathy of the jurors for those depositors because money belonging to them—and not to the bank—had been abstracted by the plaintiff in error, even though those depositors might have consented to it. The jury undoubtedly believed that those depositors suffered the loss of their money because of the alleged abstraction by the plaintiff in error, whereas as a matter of fact they suffered no injury whatever if the money belonged to the bank, and that point would have been made entirely clear to them, and they would probably have acquitted plaintiff in error, had the trial Court instructed the jury that they were trying plaintiff in error solely for abstracting money of the bank.

Even this learned Court itself, in its majority opinion, refers to the moneys alleged to have been abstracted by the plaintiff in error as “the depositors’ moneys”. On page 9, lines 29 to 32, of the majority opinion this Court says:

“The letters signed on June 20, 1911, by both of these depositors at the instant of the National Bank Examiner were clearly ineffectual to legalize **the abstraction of the depositors’ moneys by the plaintiff in error.**”

If, after discussing at length the question whether or not the money belonged to the depositors, and

deciding that it did not, this learned Court is still subconsciously of the opinion that the money did belong to the depositors, surely it ought not hesitate to grant a rehearing to plaintiff in error, who has suffered grievous injury because the jury, acting under the instructions of the trial Court, convicted him of unlawfully abstracting money belonging to the depositors—which is not an offense against the United States and of which the Court had no jurisdiction.

II.

In its majority opinion this Court, in holding that the evidence does not show embezzlement, states (page 8):

“But it does not follow, and the court would not be justified in holding that because the plaintiff in error was the manager of the bank the possession of moneys in the bank was his possession and not that of the bank. Clearly, all funds deposited were deposited with the bank, and not with the president and manager thereof, and the possession of the deposits was the bank’s possession.”

We respectfully submit that under that reasoning of the Court *there could not possibly be embezzlement by an officer or employee of a corporation*. Yet Congress provides in Section 5209 for the offense of embezzlement by an officer of a national banking corporation. Under that reasoning there has never existed a necessity for the

creation of the offense of embezzlement. Possession is a physical fact of human control over property, exercisable only by a natural person. In this case the undisputed evidence is that the board of directors had turned over the entire physical control of all the bank's property to the plaintiff in error. Counsel deem it to be elementary and unquestionable law that the agent or employee of a corporation who has actual physical control of the corporation's property for a specified purpose has possession, and if he fraudulently appropriates it to his own use he is guilty of embezzlement. (See 15 Cyc., 493-494; Clark on Criminal Law, p. 307, Sec. 100.)

In *United States v. Harper*, 33 Fed. 471, 475-476, an indictment under Section 5209, the Court said:

“If the evidence establishes that the business and assets of the bank were actually or practically intrusted to the care and management of the defendant, so that, by virtue of his position as vice-president, director, or agent, he had not merely access to, or a constructive holding of, but such actual custody of the funds, moneys, and credits of the association as enabled him to have and exercise control over the same, that would place him in the lawful possession of said funds, or other property; and if, while so lawfully in possession of such assets, funds, and credits, or other property committed to his care and custody for the benefit of the bank, he wrongfully converts any part or portion of said assets to his own use, with intent to injure or defraud the association, he would thereby commit the

offense of embezzlement. If his position and employment gave the defendant a superior or a joint and concurrent possession with subordinate employees or agents of the bank, that would be sufficient to place him in such lawful possession as would enable him to commit the crime of embezzlement in relation to assets of the bank so committed to his keeping. If, for example, his position and employment in the bank gave the defendant a joint or concurrent possession and custody of the bank's moneys, funds, and credits with the teller, cashier, or agent; and if, while so lawfully in possession, either alone or jointly with other officers or agents of the bank, he wrongfully converts said funds or assets to his own use, with intent to injure or defraud the association, he would thereby commit the offense of embezzlement."

If the Court is of the opinion that the offense of embezzlement cannot be committed by an officer or employee of a national bank because the officer or employee cannot have possession of the bank's property, counsel believe that its opinion will be of the greatest interest to all the prosecuting officers of the Department of Justice of the United States who are charged with the drafting of indictments, and who have drafted indictments for embezzlement under this statute in virtually thousands of cases against presidents of national banks. We therefore respectfully request a rehearing that the Court may have such aid as counsel can give in thoroughly arguing that question to the end that the law, not only controlling this case, but scores of similar cases may be definitely settled.

III.

We respectfully call the Court's attention to the fact that, even under the Court's own theory, the evidence in this case merely shows that the plaintiff in error drew a memorandum check and made a deposit slip which resulted in causing a credit to be entered in his account. Certainly those acts in themselves did not constitute an unlawful abstraction—or taking. When was any money taken from the bank or delivered to the plaintiff in error? Was it taken from the vaults of the bank by the plaintiff in error himself? Or was it delivered to him by another employee of the bank upon his drawing a check on his own account which had been unlawfully increased in credit? In the latter event the offense would be willful misapplication of the bank's moneys, or obtaining money under false pretenses, and not unlawful abstraction, and the plaintiff in error would be entitled to an acquittal under this indictment. We respectfully insist that there is no evidence whatever in reply to any of these questions, which are the most material questions in the case.

IV.

Two of the Judges of this Court have held that the indictment charges the abstraction of money *of the bank*. One of the Judges of this Court, and

the Judge of the trial Court, have held that it charges the abstraction of money *of the depositors*. Where the language of an indictment is ambiguous—and, *a fortiori*, where the Judges are equally divided—the Supreme Court of the United States has held that the construction more favorable to the accused shall prevail.

Bolles v. Outing Co., 175 U. S. 262, 265.

Would not justice better be effected in this case if the two learned Judges delivering the majority opinion were to state that in their view the more reasonable construction of the indictment is that it charges the abstraction of money of the bank, but because of its ambiguity and the fact that one of their associate Judges is of a contrary opinion, that the principle announced by the Supreme Court in the case last above cited should be applied, and the demurrer to the indictment be sustained, or at least that the exceptions to the instructions of the trial Court be sustained?

We respectfully submit that a rehearing should be granted plaintiff in error.

Dated, San Francisco,
November 15, 1916.

JOHN L. McNAB,
*Attorney for Plaintiff in Error
and Petitioner.*

JAMES W. RYAN,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am the attorney for the plaintiff in error and petitioner in the above entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

JOHN L. McNAB,
*Attorney for Plaintiff in Error
and Petitioner.*

